

THE HISTORY OF THE CAPE SUPREME COURT AND ITS ROLE IN THE
DEVELOPMENT OF JUDICIAL PRECEDENT FOR THE PERIOD 1827-1910

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of Laws

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A well known Advocate on his
steed outside The Supreme Court
Circa 1860

' Let the Judges also remember, that
Solomon's throne was supported by
Lions on both sides. Let them be
Lions, but yet Lions under the
throne : being circumspect they
do not check or oppose any points
of Sovereignty. '

Francis Bacon, of Judicature
Essays Civil and Moral

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PREFACE

Hahlo and Kahn have aptly described South African Law as a 'three-layered cake'.¹ This dissertation is not so much concerned with the ingredients of the cake, but with the Cape Supreme Court which was used to 'bake' the third layer, and the judges who were employed to supervise the task. However, in order to wet the appetites of the legal gourmets, an attempt has been made to analyse the ingredient of judicial precedent, and to serve it up in the form of 'icing'.

A survey of the traditional source materials utilized by lawyers, revealed a paucity of publications on the history of the Cape Supreme Court and on the early stages in the development of judicial precedent. It was therefore necessary to utilize archival material, government publications and unpublished theses. In approaching the subject, Hahlo and Kahn's concise survey² proved to be an ideal starting point for conducting the investigation. Buttressed with Walker's biography of Lord de Villier's,³ it was possible to obtain an overall picture of the developments which occurred during the period under consideration.

Firstly it was necessary to ascertain the policy considerations which prompted the British authorities to remodel the Cape courts on English lines, while retaining

1. H.R.Hahlo and Ellison Kahn, The South African Legal System and its Background, Cape Town : Juta, 1968, p.584.
2. H.R.Hahlo and Ellison Kahn, South Africa : The Development of its Laws and Constitution, London : Stevens; Cape Town : Juta, 1960, p.205-220.
3. Eric A. Walker, Lord de Villiers and his times in South Africa, 1842-1914, London : Constable, 1925.

the Roman Dutch Law as the legal system of the colony. Recourse was had to printed copies of official documents,⁴ as well as to unpublished theses by Fryer,⁵ Johnstone,⁶ and Visagie.⁷ It emerged that the Cape Supreme Court was intended to serve as the instrument for orchestrating a gradual anglicization of the legal system.

With the birth of the Cape Supreme Court on 1 January 1828, the policy of anglicization took a giant leap forward. Its founding charter had provided the infrastructure on which it was possible to build a system of judicial precedent. However, this unseen mechanism, which was to permeate into the reasoning behind the law and become established as one of the sources of the law itself, went largely unnoticed in the early history of the court. Attention was focussed, instead, on the relationship between the judiciary and the executive authority.

The experimental period, which commenced in 1828 and ended in 1834, highlighted the inflexibility of the Charter of Justice and was characterized by the strained relationship which developed between the Governor and the Chief Justice. This relationship, together with considerations of economy, made it necessary to amend the Charter. Although the Charter had separated the judiciary from the executive authority, the relationship still had to be clearly defined in practice. The Governor was determined to retain a firm control over the judiciary. The judges, however, were

4. G.M.Theal, Records of the Cape Colony, 36 vols., London, 1897-1905.
5. S.W.J. Fryer, Die Instelling van die Rondgaande Hof (Kommissie van Regspleging), Unp. M.A. thesis, US, 1949.
6. A.M.Johnstone, The Judicial aspects of the 1823 Commission of Inquiry to the Cape of Good Hope, Unp. M.A. thesis, UNISA (R.U.C.), 1936.
7. G.G.Visagie, Regsveranderinge aan die Kaap tussen 1823 en 1838, Unp. M.A. thesis, UCT, 1954.

equally determined to preserve their position as 'lions under the throne'. The Supreme Court emerged from the experimental period with a reduced Bench, an enlarged master's office, and a Chief Justice who was somewhat diminished in status and pocket. It is also clear that the judges had begun to lay down the foundations of judicial precedent. At the outset they had adopted the practice of delivering the reasons for their judgments in open court and the press was free to report the proceedings. Counsel began to rely on the precedents of the Court of Justice, and it was not long before they began to cite the decisions of the court itself. The judges adopted a cautious approach when considering the previous decisions of the court, and they soon began to expressly rely on them to justify their judgments.

The period 1834 to 1846 was characterized by external rather than internal developments in the chronicle of the Cape Supreme Court. In 1836 the jurisdiction of the court was extended beyond the colonial boundaries by the Cape of Good Hope Punishment Act. The Eastern districts of the colony were placed under the administration of a Lieutenant-Governor, who questioned the rank and precedence which the judges enjoyed whilst conducting circuits in his domain. In 1842 Judge Menzies fuelled the already strained relationship which existed between the executive and the judiciary by crossing the river at Alleman's Drift, and, purporting to act under the Cape of Good Hope Punish-

ment Act, he proclaimed the area British territory. However a far more important development took place in Cape Town, when the Legislative Council decided to flex its muscles and proceeded to test its relationship with the judiciary. The judges misjudged the prevailing mood and decided to resist the authority of the Council. Their ingeniously contrived arguments were in vain and the Legislative Council was empowered to amend the Charter of Justice, thereby subordinating the judiciary to the local legislature. Emboldened by their newly acquired powers, and spurred on by considerations of economy, the members of the Legislative Council set up a Committee to investigate the judicial establishment. The Committee decided, by the Chairman's casting vote, to emasculate the Supreme Court by breaking it up into a number of decentralized local courts. However the Secretary for Colonies was not prepared to sanction the recommendations, which would have blunted the court as an instrument of anglicization, and he directed that a centralized Supreme Court at Cape Town, with jurisdiction throughout the colony, had to be maintained. During the traumatic period when the fate of the Supreme Court was in the balance, events took place in Natal which enhanced and extended the influence of the court.

The District of Natal was annexed to the Cape and a District Court was established in 1845. A right of appeal lay to the Supreme Court in civil matters, and criminal

cases could be removed to Cape Town for the determination of points of law. Although Natal was separated from the Cape Colony in 1847, the Cape Supreme Court continued to hear appeals from Natal until 1853. In dealing with the Natal Districts Court, and its relationship with the Cape Supreme Court, recourse was had to unpublished theses by Flanagan⁸ and Spiller.⁹

By antagonizing the Lieutenant-Governor of the Eastern Districts and by refusing to kowtow to the Legislative Council, the judges had provoked the British authorities into subordinating the judiciary to the Legislative power. The judges were accordingly placed under the mace and could no longer be termed 'lions under the throne'. However in wielding the mace, the members of the Legislative Council had overreached themselves when they attempted to break up the Supreme Court. Although a number of 'evils' had been unearthed in the inquiry, the suitably chastised legislature was reluctant to implement the necessary reforms.

In the field of judicial precedent it is clear that the judges were achieving uniformity in the decisions of the Supreme and circuit courts. In his address to the Legislative Council, the Attorney-General drew attention to the success which had been achieved in correcting the conflicting decisions of the circuit courts. He attributed this to the action of the Supreme Court, and to the extent to

8. Brigid Flanagan, Henry Cloete in Natal, 1843-1855, Unp. M.A. thesis, UNISA, 1946.

9. P.R. Spiller, The Natal Supreme Court : Its origins and early development, 1858-1874, Unp. Ph.d. thesis, UN, 1982.

which discussion in Cape Town had established principles that were being recognized as precedents on circuit. It is also clear that the Recorder of Natal, Hendrik Cloete, considered himself to be bound by the decisions of the Supreme Court, provided that they were in accordance with the principles of Roman Dutch Law.

During the period of growing pains which lasted from 1846 to 1865, the composition of the Bench underwent a number of important changes. Judge Menzies, who had shouldered the responsibility of preserving the Roman Dutch Law, died in harness at Colesberg in 1850. Fortunately this task was taken over by Judges Cloete and Watermeyer. Soon after the granting of representative government in 1853, in which the judges played both a direct and an indirect role, the newly constituted Parliament focussed attention on the judicial establishment. Trial by jury was extended to civil cases, the system of circuit courts was thoroughly investigated, the standard of prosecution in the circuit courts was improved and the sheriff's office was subjected to an inquiry. However attempts to secure an independent Supreme Court for the Eastern districts of the colony were unsuccessful. In 1855 provision was made to increase the Bench to four judges, but a fourth appointment was only made in 1858. The colonial boundaries were expanded as a result of the Frontier Wars, and the judges were having difficulty in coping with the circuits. Political rather than judicial considerations, however, forced the govern-

ment to establish a division of the Supreme Court at Grahamstown in 1865.

The movement leading up to the establishment of the Eastern Districts Court of the Cape of Good Hope originated in the report of the Commission of Inquiry of 1823. The Commissioners had recommended that the colony be divided into two distinct and separate provinces for both administrative and judicial purposes. The rejection of these recommendations by the British authorities met with a great deal of opposition from the inhabitants of the Eastern districts, and they began to agitate for a separate court as part of their overall strategy for an independent government. It was therefore necessary to consider the subject in the broader context of Eastern Cape Separatism. In this respect Le Cordeur's thesis¹⁰ proved to be most useful. Although the Easterners obtained their court, its subordinate status gave birth to a long-lived grievance;¹¹

'That the judges at Cape Town, of no higher status, sat in judgment on their brethren in the East, but themselves were subject to check only by the Privy Council.'

Although the Eastern Districts Court helped to ease the pressure which had made the circuits almost unbearable, it failed to satisfy the separatists. Their continued agitation for a third judge and an independent court of equal status to that of the Supreme Court prompted the Governor to institute a Commission of Inquiry into the Judicial Establishment in 1874. The Supreme Court had succ-

10. Basil Le Cordeur, The Politics of Eastern Cape Separatism, 1820-1854, Cape Town : OUP. 1981.

11. H.R.Hahlo and Ellison Kahn, South Africa : The Development of its Laws and Constitution, London : Stevens; Cape Town : Juta, 1960, p.209.

essfully weathered the period of growing pains and had emerged with a Bench of five judges. Nonetheless its greatest challenge still lay in the Eastern districts of the colony, where its newly created tributary was in danger of being cut off, and its future as the 'grand fountain of the law' was by no means secure.

During the period of maturity which commenced in 1865, the Eastern Districts Court opened its doors for business at Grahamstown. In 1866 it took over the functions of the Kaffrarian Supreme Court, but despite constant pressure it continued to function as a two judge court. When the colony obtained responsible government in 1872, the British authorities were obliged to take a back seat in judicial affairs and the Molteno Ministry appointed Johan Hendrik de Villiers Chief Justice. Fortunately for the Supreme Court, de Villiers was a staunch supporter of centralization, and when he was appointed Chairman of the 1874 Commission of Inquiry into the Judicial Establishment, he thwarted all attempts to secure equal status for the Eastern Districts Court.

An important breakthrough occurred in the field of judicial precedent when the Menzies Reports were published in 1870. In 1877 the Chief Justice was able to state that;¹²

'The decisions of the Supreme Court of this colony are received with as much respect in the courts of the Republics and, if I am not misinformed, in the courts of Natal and Griqualand West, as the decisions of their own courts.'

12. Eric Walker, *op.cit.*, p.77.

In 1879 the Easterners secured a third judge for their court, and a Court of Appeal was established¹³ the appealing years had begun. The Appeal Court, which was composed of the Chief Justice, the two Cape Town puisnes and the Judge President of the Eastern Districts Court, was empowered to hear civil appeals from the Eastern Districts Court and the circuit courts. In criminal cases, it was empowered to consider special entries of irregularity and reservations of points of law from the Supreme Court, as well as from the other courts. Thus although the Eastern Districts Court obtained a third judge, and despite the fact that it stood on equal terms with the Supreme Court in criminal cases, it was still denied concurrent jurisdiction in civil cases. The blow which had been dealt to the Supreme Court must have been a galling experience for the Chief Justice, but the pill was somewhat sweetened because, in practice, the Appeal Court was really the Supreme Court sitting under another name.

In 1880 Griqualand West was annexed to the Cape Colony, and the Supreme Court acquired concurrent jurisdiction with the High Court of Griqualand, which became a division of the former. In 1882 the Kimberley Bench was enlarged to three judges and the structure of the superior courts was made uniform.¹⁴ The Judge President of the Griqualand High Court was given a seat on the Appeal Court, and the jurisdiction of the Supreme and Eastern Districts Courts was extended to the Transkeian territories and Griqualand

13. Administration of Justice Amendment Act No.5 of 1879.

14. Administration of Justice Act No.40 of 1882.

East.

However the Court of Appeal received a mixed reaction, and amidst great opposition, especially from the Eastern districts, it was abolished in 1886.¹⁵ The Supreme Court was vested with all the powers of the former Court of Appeal, and appeals from the Grahamstown, Kimberley, and circuit courts had to be heard by not less than three judges, one of whom had to be the Chief Justice.

During the appealing years judicial precedent was openly recognized as a source of law. The decisions of the Cape Supreme Court, and those of the Court of Appeal, commanded great respect not only within the colony, but also in the courts of the neighbouring States. In practice, the Court of Appeal was really the Supreme Court sitting under another name, and although the Kimberley and Grahamstown courts were not, strictly speaking, bound by the decisions of the Supreme Court, the judges stood the risk of having their judgments overruled on appeal if they stepped out of line. It is therefore not surprising that the decisions of the Supreme Court held first place as authorities at Grahamstown and Kimberley. The importance of judicial precedent was further evidenced by the rapid growth in the publication of law reports. The current reports began to be printed on a regular basis, and most of the early decisions of the Supreme Court had been published. Finally the Chief Justice began to lay down the principles

15. Appeal Court and Sheriff's Duties Act No.17 of 1886.

of stare decisis, and this proved conclusively that judicial precedent had come of age.

During the twilight years the fundamental structure of the superior courts remained unchanged until 1904,¹⁶ when single judge Divisional Courts were established. In 1885 the grand jury was abolished, and the laws regulating trial by jury were amended and consolidated. In 1891 the Supreme Court took over the functions of the Vice-Admiralty Court, and in 1894 it was empowered to hear appeals from the Matabeleland High Court. In 1895 its jurisdiction was extended to the newly annexed territory of British Bechuanaland, and in 1898 it was given appellate jurisdiction to hear appeals from the High Court of Southern Rhodesia. When a Special Court was established to try cases of High Treason and crimes of a political character in 1900, the quorum of the superior courts was reduced to a single judge. In 1904 the Special Court was abolished and single judge Divisional Courts were established. In 1907 the High Court of Griqualand was reduced to a single judge court, but, although under the constant shadow of dismemberment, the Eastern Districts Court retained its Bench of three judges.

When the Court of Appeal was abolished in 1886, the Grahams-town and Kimberley courts were explicitly bound to follow the decisions of the Supreme Court. The doctrine of stare decisis was recognized because of its 'expediency and its

16. Better Administration of Justice Act. No. 35 of 1904.

equity in giving expression to legitimate expectations'.¹⁷ A pronouncement by the Supreme Court, though it could be rejected by the court itself if clearly shown to be wrong, was (subject to certain exceptions) absolutely binding on the other courts. However it would appear that when Divisional Courts were established in 1904;¹⁸

'No Bench—not even one of a single judge—need have followed the ruling of a Divisional Court.'

This resulted in a divergence of views in some important legal questions. Even the mighty Chief Justice when sitting as a Divisional Court judge, however, could have been overruled by a full Bench of the Supreme Court.

When the union of Southern African States was achieved in 1909, a single Supreme Court of South Africa was established 'with an Appellate Division at its apex, and provincial and local divisions at its foundation'.¹⁹ The Cape Supreme Court became a provincial division of the Supreme Court; and the Eastern Districts Court, the High Court of Griqualand and the various circuit courts became local divisions. The Cape courts retained their original jurisdiction and the judges remained in office with the same rights to salary and pensions as had prevailed in the colony.

17. Ellison Kahn, *The Rules of Precedent Applied in South African Courts*, South African Law Journal, vol.84, 1967, p.46.

18. Kahn, *loc.cit.*, p.47.

19. Hugh Corder, Judges at Work : The Role and Attitudes of the South African Appellate Judiciary, 1910-1950, Cape Town : Juta, 1984, p.21.

CHAPTER ONE

1. EVENTS LEADING UP TO THE CREATION OF THE CAPE SUPREME COURT, 1795 - 1826¹

1.1. INTRODUCTION

In commenting on the effect of the Royal Charter of Justice of 1827, Hahlo and Kahn state that 'within a lustrum the legal institutions of the Cape had been transmogrified'.² However a number of important changes had already been made to these institutions in the period preceding the 'lustrum'. It is apparent that the legal institutions at the Cape were already being altered during the First British Occupation which lasted from September 1795 to February 1803. On 6 January 1797 a Vice-Admiralty Court was commissioned at the Cape in order to hear 'all piracies, felonies and robberies and all accessories thereto' according to the law of the Admiralty.³ Another innovation occurred in 1797 when the Governor⁴ constituted himself and the Lieutenant-Governor into a court of Civil Appeal which replaced the Court at Batavia.⁵ The court was given jurisdiction to hear civil appeals in cases involving a minimum of two hundred pounds and further appeal lay to the Privy Council where the amount in dispute exceeded five hundred pounds. Furthermore membership of the Court of Justice was reduced from thirteen to eight and the judges were paid

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1. For a description of the administration of justice during the period 1652-1806, see G.G. Visagie, Regspiegeling en Reg aan die Kaap van 1652 tot 1806, Kaapstad : Juta, 1969.
 2. H.R. Hahlo and Ellison Kahn, South Africa : The Development of its Laws and Constitution, London : Stevens; Cape Town : Juta, 1960, p.205.
 3. V.C. 58, Commission appointing a Court of Admiralty at the Cape of Good Hope.
 4. Earl Macartney governed the Cape from 5 May 1797 to 20 November 1798.
 5. Eric A. Walker, A History of South Africa, London : Longmans Green, 1928, p.132.

salaries.⁶ The criminal procedure was also amended when 'the practice of proceedings by torture against persons suspected of crimes and of punishment after conviction in many capital cases by breaking upon the wheel and other barbarous modes of execution' was abolished.⁷

A clear indication of the policy which was followed in judicial matters appears in the correspondence between the Governor and the Secretary of State for War and Colonies. Lord Hobart referred to the 'manifest defects' in the system of justice and indicated that a 'better system should be substituted'.⁸ However, he did not think that it would be expedient to introduce any innovations at the time. The Governor agreed with this assessment and reported that;⁹

'However objectionable the present constitution of the Court of Justice at the Cape whose judicial proceedings have been frequently complained of and however unwilling the British subjects residing here may be to submit to its jurisdiction, still I am not of the opinion that the English system of laws and jurisprudence can be introduced here with propriety at present, nor does it appear to me that any sudden or premature alterations in the forms of legal procedure could, for some time to come, be attended with beneficial effects. The proceedings of the Court of Justice are regulated by the Civil Roman Law. The supreme judges, however, are not civilians nor professional lawyers. The forms of the court are in other respects faulty and in some instances their

6. Walker, loc. cit.

7. V.C. 58, Instructions to Macartney dated 30 December 1796, p.8, article 5.

8. G.M. Theal, Cape Colony Records, vol.3, p.480. Letter dated 12 December 1801.

9. Theal, op.cit., vol.4, p.115.

decisions are supposed to have had a partial bias, nevertheless the inhabitants at large are satisfied with its administration, and indeed, so far as I am able to judge, the court is not inadequate to the purposes of its establishment since the decrees of the Court of Justice have been found in most cases, the cognizance of which have devolved to the Court of Appeals, consonant to the principles of equity and justice.'

In February 1803 the Cape was handed over to the representatives of the Batavian Republic in terms of the Treaty of Amiens. The task of administering the Cape was entrusted to Commissioner-General J.A.de Mist and General J.W. Jansens. The Court of Justice was radically reformed. It now consisted of a president and six judges, all of whom were professional lawyers, appointed and remunerated by the Batavian government.¹⁰ The court was made independent of the executive and the Fiscal was replaced by an Attorney-General who acted as public prosecutor. Appeals from the Court of Justice lay direct to the supreme court at the Hague. A new institution, the Desolate Boedelkamer, was established in order to attend to estate matters on behalf of the secretary of the Council of Justice. However, the 'tantalising' period of liberalism did not last long and the Cape reverted back to British rule in 1806.

The Court of Justice reverted to its pre-Batavian amateur condition and the Fiscal once more became the public prosecutor.¹¹ The Vice-Admiralty Court was revived and in 1807 the Governor again constituted himself as a Court of Civil Appeal.¹² However three important changes were made to the legal institutions before the Cape was formally

10. J.P.Van der Merwe, Die Kaap onder die Bataafse Republiek, 1803-1806, Amsterdam, 1926, p.81 ff.

11. Walker, *op.cit.*, p.147.

12. J.W. Wessels, History of Roman-Dutch Law, Grahamstown : African Book Company, 1908, p.363.

ceded to Britain by the Convention of London in 1814. In 1808 a right of appeal was allowed in criminal cases to the Governor sitting with two nominated assessors.¹³ In 1811 a system of circuit courts was introduced and in 1813 court proceedings were opened to the public. The last two changes were especially significant because they introduced principles of English law and jurisprudence and paved the way for the more extensive changes which were to follow.

1.2. CIRCUIT COURTS¹⁴

The subject of circuit courts was first raised by Sir George Younge in 1801.¹⁵ Younge's proposals were enthusiastically received by Lord Hobart who felt that they could not fail to improve the legal system at the Cape.¹⁶ The subject was taken up by Younge's successor, Major-General Dundas, who reported that 'some such measure had long been necessary and ought to be immediately adopted'.¹⁷ However the introduction of circuit courts was delayed until after the British had reoccupied the Cape. Fryer provides the following two reasons for the delay;¹⁸

'Die omstandigheid dat die permanente besit van die Kaap deur Engeland nog in die weegskaal was, het stellig iets daarmee te doen gehad. Dat daar nie tot die instelling van die rondgaande hof oorgegaan is nie, kan ook toegeskryf word aan die kritieke toestand van die Kaap se finansies in 1801 toe die idee vir die rondgaande hof op die voorgrond gekom het.'

13. Hahlo and Kahn, op.cit., p.204.

14. For a description of the circuit courts, see S.W.J. Fryer, Die Instelling van die Rondgaande Hof (Kommissie van Regspleging), Unp. MA thesis, US, 1949.

15. Theal, op.cit., vol. 3, p.370. Letter dated 5 January 1801.

16. Theal, loc.cit., p.481.

17. Theal, op.cit., vol.4, p.117.

18. Fryer, op.cit., p.58.

In 1811 the British were more firmly entrenched at the Cape and the Governor went ahead and established a system of circuit courts without obtaining the prior approval of the Colonial Office.¹⁹ Fryer provides the following description of the circuit courts which were based on the English prototype;²⁰

'Die rondgaande hof aan die Kaap, met die uiterlike kleeft waarmee dit omhul is, met die reëls waarvolgens die verigtinge van die hof gereël is, is 'n navolging van die stelsel in Engeland in swang, en in nou ooreenstemming met die praktyk wat in die Engelse rondgaande hof gevolg is.'

It is clear therefore that the circuit courts had opened the door to the introduction of English procedural law. When considering appointments to the courts it followed that preference would be given to applicants who possessed a knowledge of the English language. Government reaction to the circuit courts was highly favourable and Sir John Cradock expressed this in the following manner;²¹

'The institution of the commission of circuit has gone further in establishing the prosperity of this colony upon the basis of justice and the impartial and active execution of the laws than all other measures that ever had been contemplated.'

An important provision in the circuit court proclamation provided that 'all examinations in cases upon which a decision is to be given, shall be held in open court.'²² The admission of the public to the circuit court proceedings was in sharp contradiction to the practice of the Court of Justice where the proceedings were conducted behind closed doors.

19. Proclamation dated 16 May 1811.

20. Fryer, op.cit., p.94.

21. Theal, op.cit., vol.9, p.219. Letter dated 20 August 1813.

22. Article 21.

1.3. PUBLIC TRIALS

Although the pleadings were accessible to the public it was customary for the Court of Justice to hear the testimony of the witnesses in camera. The witnesses were required to make their depositions to a commissioner of the court. The depositions were taken down and then read to the judges behind closed doors and all persons except the parties concerned were excluded from entering the court.²³ This procedure which was alien to the English practice prompted the Governor to make the following comment in his report to the Secretary for Colonies;²⁴

'In this report I also beg leave to call your Lordship's particular notice to the great value the commission (of circuit) gives to the publicity of all judicial proceedings ... with the further earnest wish that the same publicity given by provision to the proceedings of the circuits might be equally extended to the practice of the courts in Cape Town.'

The Governor took the matter up with the Chief Justice. After praising public trials in the circuit courts, he recommended that the principle should be extended to the Court of Justice and called for Truter's assistance 'in introducing this desirable measure.'²⁵ Public trials were subsequently introduced by a proclamation which provided that in future the public were to be allowed to attend all judicial proceedings.²⁶ There can be no doubt that Truter

23. C.Graham Botha, The Early Influence of the English Law upon the Roman-Dutch Law in South Africa, South African Law Journal, vol.40, 1923, p.397.

24. Theal, loc.cit., p.211. Letter dated 11 August 1813.

25. Theal, loc.cit., p.220. Letter dated 20 August 1813.

26. Proclamation dated 25 September 1813.

assisted in the introduction of the measure but it is doubtful whether Wijpkema is correct when he states that;²⁷

'Dit was alweer Truter wat die hand gehad het in hierdie saak, en wat die aandag van die Engelse regering in die Kaapkolonie gevestig het op ou-Hollandse bron van hierdie beginsel... Die proklamasie dus heeltemaal die gees van die opsteller, n.l. Truter, aan wie opgedra was om 'n wetsontwerp daaromtrent te maak.'

The opening of the doors of the Court of Justice to the public 'altered and amended the whole state of the judicial proceedings and gave confidence and satisfaction throughout the community'.²⁸

It is clear therefore that prior to the Convention of London in 1814, significant changes had already been made to the legal institutions of the Cape. The introduction of a system of circuit courts and the admittance of the public to the proceedings of the Court of Justice had paved the way for the more extensive changes which were to follow. The Convention of London had, in turn, cemented the foundations of a policy of anglicization and this gave rise to the idea that the best manner of ruling the colony would be through the importation of the English legal system.²⁹ However, the time was not yet ripe for a large scale introduction of English law and the British government preferred to adopt a policy of gradual change. It is not surprising therefore that the next significant change was only introduced in 1819.

27. A.Wijpkema, Die Invloed van Nederland en Nederlands-Indië op Onstaan en Ontwikkeling van die Regswese in Suid Afrika, Amsterdam : Swets & Zeitlinger, 1934, p.133.

28. Graham Botha, loc.cit., p.398.

29. G.G. Visagie, Regsveranderinge aan die Kaap tussen 1823 en 1838, Unp. MA thesis, UCT, 1954, p.37.

1.4. CROWN TRIALS

In 1819 a new form of criminal procedure was introduced by the Crown Trials proclamation.³⁰ It is clear that the framers of the proclamation had intended to assimilate the procedure to that of England.³¹ The proclamation accordingly incorporated a number of principles which were based on English practice. The framers, however, approached their task gingerly and they based the proclamation on the old form of practice in accordance with the policy of gradual change. This is apparent in the preamble to the proclamation which reads as follows;³²

'We...establish the following mode of proceedings in criminal cases, containing the spirit of the existing laws...under such modifications as may tend to combine the benevolent principles of the present government with the mode of proceedings in the prosecution for crimes and misdemeanours heretofore in use in this colony, in as far as the nature of the case will admit.'

The influx of British settlers in 1820 added impetus to the policy of anglicization and the government was moved to adopt a more decisive approach to the legal system. The stage was accordingly set for the next act which was directed towards the introduction of the English language in all official and judicial business.

1.5. INTRODUCTION OF THE ENGLISH LANGUAGE IN THE COURTS OF LAW

In 1822 the Secretary for Colonies directed the Governor

30. Proclamation dated 2 September 1819.

31. Graham Botha, loc.cit.

32. Theal, op.cit., vol.25, p.90.

to take the proper measures to introduce the English language in all the official and judicial proceedings in the colony.³³ He further directed that in the case of judicial proceedings, the proclamation had to be put into operation no sooner than 1826 and not later than 1827. The Governor duly introduced the proclamation on 5 July 1822.³⁴ It directed that the English language had to be exclusively used in all the official documents of the office of the government secretary from 1 January 1823 and in all the other government offices from 1 January 1828. It further provided that the proceedings of the supreme and inferior courts had to be conducted exclusively in English from 1 January 1827. The decision to introduce the English language in the colonial courts had also prompted the Secretary for Colonies to suggest that the Court of Justice should be reformed. He felt that this would produce a greater efficiency in the judges and would also help to facilitate the introduction of English in the court proceedings. Furthermore he suggested that it would assist with the gradual assimilation of the colonial law to what he termed 'the more enlightened maxims of British jurisprudence' without 'suddenly or forcibly' interfering with the existing laws of the colony.³⁵ The English language proclamation was roundly condemned by the judiciary. They voiced their disapproval by stating that they could not apply it 'without endangering that dignity and confidence inseparable from a due administration of justice'.³⁶ This reaction added impetus to the Secretary of State's suggestion and the Court of Justice was cast under the spotlight.

33. Theal, *op.cit.*, vol.14, p.297. Letter dated 23 February 1822.

34. Theal, *loc.cit.*

35. Theal, *loc.cit.*, p.371. Letter dated 20 May 1822.

36. Theal, *op.cit.*, vol.28, p.446.

1.6. THE COURT OF JUSTICE UNDER THE SPOTLIGHT

The Under-Secretary for Colonies, Henry Ellis, took up the issue as he wanted to sever the Cape from all connections with the Netherlands.³⁷ He selected the court as the instrument for promoting the British policy of anglicization at the Cape. According to this plan there would be no necessity to 'suddenly or forcibly' interfere with the colonial laws and the colonial expenditure would be kept to a minimum. Ellis proposed that the Bench should be reduced to three judges and suggested that Admiralty jurisdiction should be vested in the newly constituted court. In a highly critical assessment of the Court of Justice, Ellis stated that;³⁸

'It would be invidious to relate the instances in which the proceedings of the court as now composed have excited mockery or discontent. It is sufficient to say that there is no confidence in their (the judges) decisions and were any accident to deprive the colony of the Chief Justice the court would fall in absolute contempt.'

The Secretary for Colonies elaborated on the plan by stating that;³⁹

'A Chief Justice and two puisne judges, being lawyers by profession, might be expected to answer every purpose of adequate and impartial deliberation and from superior efficiency, collectively and individually, would be enabled to dispatch the business of the court with greater expedition and more satisfactorily to the community.'

He also felt that it would be imperative to have at least one English judge on the Bench in order to facilitate the progressive substitution of the English language for the Dutch in the judicial proceedings and to pave the way for

37. Theal, op.cit., vol.14, p.183.

38. Theal, loc.cit.

39. Theal, loc.cit., p.371. Letter dated 20 May 1822.

the gradual assimilation of the colonial law to the English system.

However the autocratic Governor of the colony, Lord Charles Somerset, would have none of it. He expressed satisfaction with the judgments of the court and justified his assessment by pointing out that only a few of them had been reversed on appeal.⁴⁰ He was of the opinion that it would be impractical to reduce the membership of the court in view of the many various duties entrusted to the judges. He had no hesitation in stating that 'no two men possessed sufficient physical strength to perform the duties with efficiency'.⁴¹ He considered that nothing less than a Bench consisting of a Chief Justice and five judges would suffice. Furthermore he felt that the time was not ripe for reform and suggested that the period fixed for conducting judicial proceedings in English would be more appropriate for altering the constitution of the Court of Justice. He concluded by stating that the state of society in 1827 would render it more easy as well as more expedient to assimilate the judicial forms to those in use in England.⁴² However the die had already been cast and the stage moved to the House of Commons in London. On 25 July 1822, Mr. Wilmot Horton rose in the House and played his part by moving for the appointment of a Commission to inquire into the state of the settlements of the Cape of Good Hope, Mauritius, Ceylon and the Leeward Islands.⁴³

40. Theal, op.cit., vol.15, p.25. Letter dated 6 September 1822.

41. Theal, loc.cit.

42. Theal, loc.cit.

43. Theal, op.cit., vol.14, p.486.

1.7. THE 1823 COMMISSION OF INQUIRY

The Commission of Inquiry which had been set up to investigate the state of affairs at the Cape of Good Hope on 18 January 1823 was of a general nature and was not restricted to the legal system. Its origin cannot therefore be attributed to any one factor. However the instructions to inquire into the legal system can be attributed to the policy of anglicization which had given rise to the idea that the best manner of ruling the colony would be through the importation of the English legal system. The Colonial Office was opposed to a 'sudden or forceful' implementation of this policy. Attention was accordingly focussed on the Court of Justice. It was decided to reform the court and to use it as the instrument for effecting the policy. The Governor, however, was opposed to the reform of the court in the manner suggested. The matter was then taken up in the House of Commons where it was proposed that a commission of inquiry should be set up to superintend the importation of the English legal system. Wilmot Horton made this abundantly clear in the House when he explained the origin of the Commission in the following manner;⁴⁴

'The Cape of Good Hope had been annexed to the Crown during the late war. Dutch Laws and customs prevailed there. To bring about a change in this respect and to anglicize the colony was of course a most desirable object and it was to this that the Commission owed its origin; for one system of law could not all at once be made to supersede another. This could only be effected progressively and was a work which required great caution; and what better means could be devised

44. Theal, *op.cit.*, vol.28, p.397.

for carrying it into execution without risk than entrusting the management of it to a commission of gentlemen of high character and known ability ?'

1.7.1. JUDICIAL ASPECTS OF THE COMMISSION OF INQUIRY

John Thomas Bigge⁴⁵ and William Macbean Colebrooke⁴⁶ were appointed as members of the Commission on 18 January 1823. They were issued with special instructions pertinent to the judicial system at the Cape. They were instructed to investigate 'the whole system and administration of civil and criminal justice including the regulation of the police and the jurisdiction separate and concurrent of the Courts of Admiralty'.⁴⁷ They were directed to 'revert to the alterations lately made in the judicial procedure in the colonial courts and to the means of introducing a gradual assimilation to the forms and principles of English jurisprudence'.⁴⁸ They were also instructed to consider the proposed introduction of the English language in the courts of law. Individual complaints were specifically excluded from the ambit of the inquiry. However the Commissioners were instructed to ascertain whether there were any impediments preventing the complainants from obtaining redress in the courts. The instructions to exclude individual complaints appear to have been made to placate the sensibilities of the Governor, Lord Charles Somerset. Somerset had become embroiled in a series of trials involving Bishop Burnett and William Edwards.⁴⁹

45. Bigge was a former judge in Trinidad and had been employed in a similar inquiry into the state of affairs at New South Wales.

46. Colebrooke was a military officer who had no legal training.

47. Theal, *op.cit.*, vol.15, p.237. Instructions dated 18 January 1823.

48. Theal, *loc.cit.*, p.240

49. For a description of the trials, see G.E.Cory, The Rise of South Africa, London : Longmans Green, 1913, p.240-281.

The trials had caused great excitement among the British settlers and had evoked severe criticism of the administration of justice in the English press. In a letter to Somerset, the Secretary for Colonies confirmed that the Commission had not been sent to collect and redress individual grievances and would be retrospective only where necessary for the purpose of effecting practical improvements.⁵⁰

The Commissioners arrived in Simonstown on 12 July 1823 and on 24 July they opened their inquiry in Cape Town. Johnstone provides the following description of the manner in which they went about their business;⁵¹

'They investigated the system of appeals, studied the records of cases on circuit and the correspondence of Edwards, notorious for his libel of the Governor. Reports were received on the duties of the courts of Landdroste and Heemraden, on the cases before the Vice-Admiralty Court and the Court of Justice. They paid particular attention to the cases where there had been a delay in the proceedings, as in the case of Hart versus Burnett for default, and to the question of fees and costs. They investigated also the work of the Committee, consisting of Sir John Truter, Mr. Mathieson and His Majesty's Fiscal, appointed in 1818 by the colonial government to collect and compile the laws of the colony.'

They completed their inquiry in 1826 and submitted their report to the Secretary for Colonies on 6 September 1826.

1.7.2. THE REPORT

The Commissioners had been fully briefed on the policy which the British government intended to pursue at the

50. Theal, loc.cit., p.257. Letter dated 21 January 1823.

51. A.M. Johnstone, The Judicial aspects of the 1823 Commission of Inquiry to the Cape of Good Hope, Unp. MA thesis, UNISA(R.U.C.), 1936, p.8.

Cape of Good Hope and their task was to ascertain the best means whereby it could be implemented. They were also aware of the need to implement the policy in a gradual and progressive manner. They were guided in their endeavour by the idea that a reformed superior court would serve as the ideal instrument for achieving the desired objectives. It was to be expected therefore that they would pay particular to the superior courts. It is also not surprising to find that the report reflects these courts in a poor light. The highly critical approach which was adopted by the Commissioners is clearly indicated in their observations of the Court of Appeal and the Court of Justice.⁵²

1.7.2.1. THE COURT OF APPEAL

The Commissioners found that 428 cases had been referred to the Court of Appeal during the period 1807-1825.⁵³ Seventy-two cases had gone on appeal to the Privy Council.⁵⁴ An analysis of the cases revealed that the judgments of the Court of Justice had been frequently over-ruled and were made to yield to authorities collected from the English Law. They also found that only in very rare cases were the grounds of Judgment explained by the court below. They criticized the manner in which the appeals were conducted. They pointed out that at an early stage an attempt had been made to conform with the appellate proceedings of the Committee of the Privy Council.

52. Theal, op.cit., vol.28, p.2-10.

53. Theal, loc.cit., p.3.

54. Theal, loc.cit.

However this had 'recently been much neglected'.⁵⁵ They criticized the 'loaded pleadings' and the lengthy memorials which were 'unnecessarily increased by diffuse and inaccurate quotations from the commentators on Roman, Dutch and English Law'.⁵⁶ They were critical of the expense of the proceedings which were 'augmented by delays, contumacies and frivolous excuses'.⁵⁷ They also noted that the sittings of the court were irregular. They concluded their investigation of the court with the following comment;⁵⁸

'We had at an early period agreed upon the expediency, if not the necessity, of either dispensing with or otherwise providing for the exercise of the appellate jurisdiction...by an improved constitution of the Court of Justice.'

1.7.2.2. THE COURT OF JUSTICE

They found that 6985 cases had been tried in the Court of Justice during the period 1810-1825.⁵⁹ The maximum number of cases tried in any one year was 616.⁶⁰ The number of cases tried during the period 1815-1825 did not demonstrate any great increase in the business of the court. They pointed out that the judges were not required to hold professional qualifications. However they noted that all the judges had filled situations in the colony more or less connected with the administration of justice and that four of them held doctor's degrees in law. Nonetheless they came to the conclusion that the composition of the court did not attract a sufficient degree of respect

55. Theal, loc.cit., p.2.

56. Theal, loc.cit.

57. Theal, loc.cit.

58. Theal, loc.cit., p.3.

59. Theal, loc.cit., p.9.

60. Theal, loc.cit.

or confidence in its proceedings. They found that there was 'a tendency to accumulate an embarrassing degree of influence in the hands of the president through personal intercourse with the suitors'.⁶¹ They stated that this had 'gradually led the suitors to consider the possession or recovery of their rights as dependent rather upon an equitable or friendly disposition in the judge than as the necessary consequence of a just and uniform spirit in the dispensation of the Law'.⁶²

Feelings of incertitude were aggravated because the judges did not usually declare their motives or reasons when delivering judgments. Moreover they felt that the process of the court left few opportunities of entering into explanations during the trial. The court procedure had not been changed since 1796 and that rules of court had not been formulated. The proceedings were hampered by unnecessary delay in the early stages and they referred in this connection to the procedure whereby four defaults of appearance were allowed. They added that the great distance of some of the districts from the seat of the court had aggravated the delay and expense. A further source of delay was occasioned by the practice of submitting cases in their early stages to a commissioner for adjustment or mediation. They were of the opinion that the parties who rejected mediation were prejudiced. They criticized the manner in which oral evidence was procured and stated that this procedure afforded the opportunity

61. Theal, loc.cit., p.4.

62. Theal, loc.cit.

for influencing the witnesses. They pointed out that the judges were denied the opportunity of observing the conduct and demeanour of the witnesses when they were being examined. They were also of the opinion that the manner of interrogation strongly pointed to the answers which were expected. They noted that this practice seemed to have been encouraged by the advocates and notaries. They stated that the proceedings were 'calculated only for a community whose transactions were few and simple and in which the good faith of the parties superseded the necessity of recourse to a rigorous execution of the law'.⁶³

They welcomed the introduction of public trials and stated that the institution of circuit courts had greatly improved the administration of justice.⁶⁴ However they criticized the rule that required the parties to conduct their own cases in the circuit courts. They felt that there was a need for professional assistance in these courts, especially in criminal cases. They also criticized the lack of training which was evident in the circuit court clerks and drew attention to the dilatory nature of the preliminary process. In their opinion these factors had diminished the value of the circuit courts.

They pointed out that the jurisdiction of the Court of Justice was held to include that of the Vice-Admiralty Court, 'both in questions of prize of war, and in those

⁶³. Theal, loc.cit., p.7.

⁶⁴. Theal, loc.cit.

of maritime contract, seamen's wages and others and also violations of the Laws of trade and navigation of Great Britain'.⁶⁵ They were unable to ascertain whether the Court of Justice had ever entertained a prize case. However they found that a commissioner of the court had sat in judgment in cases of breach of the East India Company's Charter. They concluded by stating that the questions and interests involved in Admiralty matters were of 'too great difficulty and magnitude' to be disposed of in the Court of Justice.⁶⁶

1.7.2.3. GENERAL RECOMMENDATIONS

They referred to the proposed introduction of the English language in the courts and stated that it had already laid the basis for the adoption of the English Law. However they were not in favour of any sudden or complete change in the colonial laws.⁶⁷ Such a change would in their opinion be far too disruptive and inconvenient. They did, however, suggest that important advantages could be derived from the introduction of English legal principles. They accordingly recommended that all future laws should be framed 'in the spirit of English jurisprudence'.⁶⁸ They opposed making the existing English statute law binding in the colony, except where it might be specially declared so by subsequent enactments of the British and colonial legislatures. However they had no hesitation in recommending a complete change in the administration of justice.

65. Theal, loc.cit., p.10.

66. Theal, loc.cit.

67. Theal, loc.cit., p.15.

68. Theal, loc.cit.

They stated that although this would cause great inconvenience;⁶⁹

'It would yet be preferable to the tedious process of engrafting a modified system of it upon that which now exists, the greatest merit of which would consist in the imperfect approximation to that which we presume is the wish of His Majesty's government.'

They pointed out that the proposed change would most severely inconvenience the legal profession who would have difficulty with the technical forms of English pleading. They suggested, however, that those practitioners who had taken degrees at the Dutch Universities and who had been admitted to practice prior to the intended change should be admitted to the Bar. They cautioned against any abrupt introduction of the English practice at the same time when the language of the courts was changed on the grounds that it would unnecessarily increase the difficulty of the operation. They suggested that the introduction of the English practice should be delayed until the appropriate opportunities occurred, and more especially, until persons qualified to conduct the business of the courts had arrived in the colony. They recommended that the rules of court should be promulgated some time before they became operational in order to afford the practitioners with the opportunity to make themselves acquainted with the forms and process of pleading. They pointed out that in making their recommendations they had the following three objectives in mind;⁷⁰

69. Theal, loc.cit., p.16.

70. Theal, loc.cit., p.33.

'The entire separation of the executive from the judicial power; the establishment of an appellate jurisdiction within the colony for the purpose of correcting errors and controlling the action of the inferior courts; and lastly, an improvement in the structure of the latter with a view to secure them as much as possible from the influence of local prejudice and interests.'

1.7.2.4. SPECIFIC RECOMMENDATIONS

They recommended that British lawyers should be appointed to fill the judicial posts which would be rendered vacant when the Court of Justice was abolished. They felt that the judges of the Court of Justice could not be expected to 'suddenly relinquish the professional doctrines and opinions which all of them had learnt to cherish and respect'.⁷¹ They recommended that the future judges should be appointed from the ranks of the English, Scottish and Irish Bars and that the appointees should have had at least five years of experience at the Bar. In the place of the Court of Justice, they proposed that a Supreme Court should be established for the whole of the colony and two lower courts for the Eastern and Western districts.⁷² The Supreme Court would exercise appellate jurisdiction with the power to confirm or correct the decisions of the lower courts. It would sit as a full court, to be composed of the Supreme Court judge and the judges of the lower courts, when determining points of law arising from the pleadings before issue was joined on the facts or upon any special

71. Theal, loc.cit., p.17.

72. Theal, loc.cit., p.18.

finding of the lower courts or by a jury. The decision of the full court was to be final and without appeal, except in cases where the opinion of the judge of the Supreme Court differed from those of both judges of the lower courts, and also where the amount in dispute exceeded five hundred pounds.

The appellate jurisdiction of the Supreme Court judge would extend to all causes that had been heard and finally decided by the judges of the lower courts without the intervention of a jury and when the amount in dispute exceeded two hundred pounds. In all cases of appeal to the Supreme Court the evidence would have to be in writing and signed by the witnesses. Copies would be transmitted to the Supreme Court and no fresh evidence was to be allowed. There would be a right of appeal from the decisions of the Supreme Court to the Privy Council in cases where the amount in dispute exceeded five hundred pounds.

They recommended that the colony should be divided into two provinces and that a lower court should be established in each province.⁷³ The lower court of the Western Province would consist of two judges and the lower court of the Eastern Province of one. The lower courts would exercise jurisdiction over all persons, except the Governor, Lieutenant-Governor and the Supreme Court judge in;⁷⁴

73. Theal, loc.cit., p.19.

74. Theal, loc.cit.

'The trial and decision of all suits arising upon contracts, injuries and damages; interests in their boundaries, rights to lands and houses and property to or in which the King or individuals claim to be entitled; of claims of slaves to their freedom of property, of testamentary causes; of suits for divorce and "vinculo matrimonii" and of separation; and with the exception of those in which the sum claimed and demanded did not amount to sixty pounds.'

The judge in the Eastern Province was to have the same jurisdiction as the court of the Western Province with the exception of references to points of law arising upon the pleadings. In the Eastern Province points of law would be admitted at the stage of the cause unless they were of such a nature as to bar the right of action and would then only be admitted in cases where the amount in dispute did not exceed two hundred pounds. The judge of the Eastern Province court would also be vested with equity jurisdiction. The Supreme Court would always consist of the Supreme Court judge and the two judges of the lower court in the Western Province whenever any reference or appeal was made to it from the Eastern Province court. They recommended that the judge of the Supreme Court should be vested with the jurisdiction of an equity court with the authority to appoint one of the judges of the lower court to sit for him in case of illness or necessary absence and subject to the right of appeal to the Privy Council limited as in civil cases.

They recommended that circuit courts should be held twice yearly in the two provinces.⁷⁵ Before any action was set

75. Theal, loc.cit., p.22.

down for trial in the circuit courts, the pleadings would have to be finalised so as to enable the judges to direct their attention to the points in issue. The parties would only be permitted to produce such proof as would be necessary to support the action. They suggested that this form of practice might ultimately lead to the employment of professional men on the circuits. However, in view of the expenses involved they did not consider the recommended practice to be indispensable.

They recommended that juries should be introduced for the trial of civil cases.⁷⁶ However, they were of the opinion that it should be confined to Cape Town and the Albany district as they did not think that it would be practical to assemble a sufficient number of persons acquainted with the English language to form a jury on the circuits. The jury would be composed of nine members and questions would be decided by a majority of six. The consent of both the plaintiff and the defendant would be required. They were not prepared to allow trial by jury in issues which involved freedom, civil rights, or the property of slaves and Khoikhoi.

They recommended that courts of criminal jurisdiction should be established in each of the two provinces.⁷⁷ These courts would be designated High Courts. They would possess authority and jurisdiction in criminal matters similar to that of the Court of the King's Bench in England.

76. Theal, loc.cit., p.25.

77. Theal, op.cit., vol.33, p.110.

The High Court of the Western Province would consist of the Chief Justice and the two judges of the lower court. In the High Court of the Eastern Province the lower court judge would preside alone. The Chief Justice would always be assisted by at least one of the lower court judges. One of the judges in rotation and the judge of the eastern court would hold twice yearly circuits in the different districts of each province. They recommended that the Governor and the Lieutenant-Governor should be given the authority to issue special commissions to one or more of the judges to hold circuit courts at other places and times whenever a more prompt interposition and administration of the criminal justice was required. They also recommended that the criminal courts should be given the authority to take cognizance, at their respective seats of judicature, of any capital case which might arise in any of the districts in their respective provinces and to cause the trial of these cases to be heard without waiting for the circuit courts when it appeared that the attendance of the witnesses could be obtained without any great inconvenience to them or expense to the Crown.

They recommended that jury trials should be introduced for the trial of criminal cases where it was practical to assemble a jury of eight persons.⁷⁸ However an exception would be made in cases involving Bushmen, Prize Negroes during their term of indentures, individuals of the frontier tribes when under contracts of service and slaves. In cases involving Khoikhoi and persons of mixed race an

78. Theal, *loc.cit.*, p.112.

option would be reserved. The option would also apply to trials in those places where it was not possible to form a jury. They recommended that trial by jury should constitute the principle form of criminal trial in the colony. Trial by the court alone would be the exception, founded either upon the necessity of the case as regards the free classes of the population or upon the possible abuse or perversion of the principle in its application to two of those classes.⁷⁹ The votes of six jurymen would be sufficient to enable the court to pronounce judgment. In those cases where jury trial was excluded or not possible, the trial would be conducted by the judge of the circuit and the 'judge' of the district in which the offence was committed or of that district in which the trial was to take place. The decision of all points of law would be reserved for the circuit judge and would be referable to the High Court at Cape Town if he thought it fit and necessary. If the circuit judges differed as to the guilt of any person tried by them, a report would have to be made and submitted to the High Court at Cape Town for a final decision. They recommended that an appeal against sentence should be allowed to the accused.

They recommended that Admiralty jurisdiction should be vested in the judge of the Supreme Court and in the judge of the lower court in the Eastern province.⁸⁰ The judges would sit as Vice-Admiralty Courts and would exercise exclusive jurisdiction in questions of prize and war, in

79. Theal, *loc.cit.*, p.113.

80. Theal, *op.cit.*, vol.28, p.21.

matters touching the laws of trade and navigation and in cases involving the importation of slaves. They recommended that the provincial courts should be given concurrent jurisdiction with the Vice-Admiralty Courts in the determination of actions by seamen for their wages. A suggestion of a commencement of an action in either of these courts would be sufficient to bar all proceedings in the other for the same cause of action.

They recommended that the judges should hold their appointments during good behaviour.⁸¹ The judge of the Supreme Court would take rank next after the Governor and also after the officer in military command of the colony if he held the rank of Major-General. The judges of the lower courts would take rank after the officer next in military rank to the Governor provided that he was a full Colonel. They also recommended that the judges should take precedence over the members of the Governor's Council.

They recommended that in future the advocates would have to be members of the English, Scottish or Irish Bars.⁸² Attorneys would have to produce proof that they had been admitted to practice in the English, Scottish or Irish courts. All of the practitioners would have to produce documentary evidence of their qualifications to the satisfaction of the judge of the Supreme Court. Admission and suspension of the practitioners would be placed under the sole jurisdiction of the judiciary. They recommended

81. Theal, loc.cit.

82. Theal, loc.cit., p.26

that the duties of advocate and attorney should be separated. Notaries would be required to produce their protocols for examination by the judges at stated periods and their qualifications would be subject to a more severe examination than was previously the case.

1.7.3. CONCLUSION

The recommendations contained in the report of the Commission of Inquiry provided a practical basis for implementing the policy of anglicization at the Cape. The Commissioners had sealed the fate of the Court of Justice by drawing attention to the manifest defects which they had unearthed in its structure and operation. In its place they had recommended the establishment of courts based on the English model. Although the British government was not prepared to accept all of the recommendations, it did accept the underlying principles and many of the recommendations were incorporated in the Charter of Justice which created the Cape Supreme Court. Some of the recommendations were incorporated into the legal system at a later stage.⁸³ Others were either rejected out of hand⁸⁴ or raised in the subsequent Inquiry's of 1845 and 1875. The Commission's greatest impact, however, lay in its underlying purpose which permeated into the future development of the Cape Supreme Court.

83. Trial by jury was extended to civil cases by Act No. 7 of 1854, and the Eastern province obtained a local court by Act No. 21 of 1864.

84. The British government rejected the English form of prosecution and opted instead for the Scottish system.

CHAPTER TWO

2. THE BIRTH OF THE CAPE SUPREME COURT

2.1. INTRODUCTION

The year 1827 was destined to be a momentous one in the history of the judicial system at the Cape. The Court of Appeal, and the Court of Justice which had been in existence since 1685, were to be abolished. The doors of the Court of Justice, which had been opened to the public in 1813, were to be finally sealed with the key which had been provided by the Commission of Inquiry. Across the sea in London the authorities were hard at work giving birth to a more illustrious successor which was to take the form of the Cape Supreme Court.

The Colonial Office had received the report of the Commissioners on 6 September 1826 and although the Secretary for Colonies was not prepared to accept all of the recommendations, he decided to make a clean sweep of the colonial courts. The heart of the new structure was to be based on the English model. He agreed with the Commissioners that the changes should be of a permanent nature and he instructed James Henry Stephen, counsel for the Board of Trade and the Colonial Office, to draft a Charter of Justice which would serve as the machinery for establishing the new Supreme and circuit courts. Stephen

was instructed to make provision for a centralized court for the whole colony with its seat of jurisdiction at Cape Town. By rejecting the recommendation to establish a separate court in the Eastern province, the Secretary for Colonies incurred the wrath of the inhabitants who resided there and the demand for an independent court in the Eastern districts became a major issue in the future development of the Cape Supreme Court.

The completed draft was submitted to the Attorney and the Solicitor-General for perusal and comment. The Secretary for Colonies requested their opinion as to whether the draft contained any objections in law and whether it was properly adapted to carry the proposed changes into effect. He also invited them to make necessary alterations. Although the legal advisers had no objections in point of law, they did have a number of reservations.¹ They recommended that entry to the Bar should be restricted to applicants who had qualified in England, Ireland or Scotland. They objected to the provision which gave the Chief Justice a casting vote and they felt that an unanimous verdict should be insisted upon in jury trials.

They also had very serious doubts as to the expediency or propriety of appointing assessors for the trial of criminal cases where it was not possible to obtain the services of a full jury. They recommended that in such cases it would be preferable to appoint a jury of six members. However

1. Theal, Cape Colony Records, vol.32, p.324. Letter dated 13 August 1827.

if six members could not be found, they suggested that the cases be held over until the next circuit or that they be removed to the Supreme Court at Cape Town for trial. The Secretary for Colonies accepted most of the recommendations and copies of the report of the Commission of Inquiry and the Charter of Justice were dispatched to the Cape.² He also enclosed a letter which contained instructions relevant to the implementation of the Charter of Justice.³ While acknowledging that the Charter was a direct result of the recommendations made by the Commissioners, he drew attention to the reasons for departing from some of them in the Charter.

2.2. GENERAL DIRECTIONS

He explained that the British government had rejected an immediate introduction of the English Law because it would cause 'extreme confusion and distress'.⁴ However he stressed the importance and the necessity of gradually introducing the English Law and pointed out that skill and circumspection had to be employed in carrying it into effect. He stated that the Roman Dutch Law 'adequately provided for the ordinary exigencies of life in every form of society' and was 'not liable to any such insurmountable objections as should require its abrupt and immediate abandonment'.⁵ The Charter had accordingly made no provision for any change in the general principles of the law of the colony and the Supreme Court was enjoined to

2. Theal, loc.cit., p.253. Letter dated 5 August 1827.

3. Theal, loc.cit.

4. Theal, loc.cit., p.256.

5. Theal, loc.cit.

administer the laws in force.⁶ The task of orchestrating the introduction of the English Law was to be placed in the hands of the judges. He felt that they would be the most competent persons to consider by what steps the changes could be most conveniently introduced. It would be their duty to suggest and draft amendments to the civil and criminal laws. However the judges would not be expected to interpose their advice in the case of revenue laws or any other laws necessary for the administration of the executive government.

In executing their task, they would be expected to adhere as far as was practical to the spirit of the English Law. He referred to the peculiar role which had been delegated to the judges and requested the Governor's co-operation in assisting them to carry it into effect. He pointed out that it in no way detracted from the authority of the legislature as the Governor and the Council of Advice would retain the right to adopt or reject the judge's recommendations.

2.3. SPECIFIC DIRECTIONS

He drew attention to the specific provisions in the Charter of Justice, and where necessary, he explained the reasons which had prompted the British government to depart from the recommendations contained in the report of the Commission of Inquiry.

6. Section 33 of the Charter of Justice.

2.3.1. CONSTITUTION OF THE CAPE SUPREME COURT

The Commissioners had recommended that the colony should be divided into two provinces with a distinct court of justice in each province. This was rejected by the British government. He informed the Governor that there was no immediate plan for dividing the colony into two distinct provinces and it followed that the erection of two distinct courts would be inexpedient. He explained that;⁷

'The plan establishing a single judge at Grahamstown exercising an unlimited jurisdiction over so large a proportion of the inhabitants in all cases, civil and criminal, is open to many obvious objections which the course adopted and the Charter of Justice will...avoid.'

The Charter provided instead for the creation of a centralized Supreme Court for the whole of the colony with its seat of jurisdiction at Cape Town.⁸ The court would be constituted as a court of record and was to consist of a Chief Justice and three puisne judges who would be appointed from the ranks of barristers in England or Ireland of not less than three years standing, or advocates admitted to practise in the Court of Session in Scotland by the space of three years.⁹ The judges were to hold office 'quamdiu se bene gesserint'.¹⁰ The Chief Justice was to take rank next to the Governor, Lieutenant-Governor and the Commander in Chief of the military forces, and the judges were to take rank next to the Chief Justice.¹¹ The puisne judges were to take rank between themselves accor-

7. Theal, loc.cit., p.255.

8. Section 37 of the Charter of Justice.

9. Sections 2 and 3.

10. Section 5.

11. Sections 7 and 8.

ding to the priority of their appointments, or where their appointments were made on the same day, according to their seniority as barristers or advocates.¹² The judges' salaries were to be determined and paid by the British government¹³ and they were specifically precluded from holding any other office or from receiving any other emolument within the colony.¹⁴

2.3.2. JURISDICTION

The Supreme Court was given jurisdiction to administer the laws in force in the colony and all other laws which might be made for the colony by the King acting with the advice and consent of Parliament or the Privy Council, or by the Governor of the colony acting with the advice of the council of government.¹⁵ The Charter further provided that the Supreme Court was to have cognizance of;¹⁶

'All pleas and jurisdiction in all causes... arising within the colony. with jurisdiction over all subjects and all other persons whomsoever residing and being within the colony, in as full and ample a manner...as the court of civil and criminal justice of the colony now hath or can lawfully exercise.'

The Supreme Court was also given jurisdiction to review the proceedings of the inferior courts of justice within the colony, with the power to correct and set them aside.¹⁷

12. Section 9.

13. Section 12.

14. Section 13.

15. Section 33.

16. Section 32.

17. Section 34.

2.3.3. RULES OF PRACTICE AND PROCEDURE

The pleadings and proceedings of the courts were to be conducted in the English language and were to be accessible and open to the public.¹⁸ In criminal cases the witnesses would have to give their evidence 'viva voce' in open court. In civil matters the Chief Justice and two puisne judges would constitute a quorum.¹⁹ A majority decision of two of the judges would be required in order to bind the court.²⁰ Criminal cases were to be tried by one, or more, of the judges and a jury of nine men.²¹ No sentence of death, transportation or banishment was to be carried into execution until the presiding judge had transmitted a report of the proceedings to the Governor for his consideration and approval.²²

Extensive powers were given to the judges to enable them to establish the rules necessary for improving the course of judicial proceedings. In this respect, he advised that the recommendations made by the Commissioners would not be binding on the judges. However he suggested that they should avail themselves of the assistance which could be derived from the report.²³ The judges were authorized to frame rules, orders and regulations;²⁴

'Touching and concerning the time and place of holding the Supreme Court; and touching the forms and manner of proceedings to be observed in the Supreme and circuit courts respectively; and the practice and pleadings upon all actions, suits and other matters, both civil and criminal, indictments and information to be

18. loc.cit.

19. Section 35.

20. loc.cit.

21. Section 36.

22. Section 46.

23. Theal, loc.cit., p.272.

24. Section 47 of the Charter of Justice.

therein brought; the appointing of commissioners to take bail and examine witnesses; the examination of witnesses de bene esse and allowing the same as evidence; the proceedings of the sheriff and other ministerial officers of the said courts respectively; the process of the courts and the mode of executing the same; the summoning, impanelling and challenging of jurors; the admission of barristers, advocates, attorneys, solicitors and proctors in the said courts respectively; and touching and concerning all such other matters and things necessary for the proper conduct and dispatch of business in the said Supreme and circuit courts respectively.'

The judges were free to revoke, alter, amend or renew all such rules, orders and regulations. These powers were subject to a number of important provisos. The rules had to be framed so as to promote economy and expedition in the dispatch of the business of the courts and with reference to the corresponding rules and forms in use in the Courts at Westminster. They had to be promulgated at least three months before taking effect and had to be transmitted to the British government for approbation or disallowance. Finally they had to be framed in a manner not repugnant to the Charter. The Charter further provided that the advice and the consent of the Chief Justice was to be obtained when the rules of practice and proceedings were being formulated for the inferior courts.²⁵

In commenting on the broad powers which had been given to the judges for the purpose of establishing the rules of practice and proceeding, he explained that these powers had been entrusted to the supreme tribunals in England

25. Section 50.

and to the colonial courts in general, 'although to a more limited extent and subject to more numerous exceptions'.²⁶ He referred to the Commissioners' recommendation that the proceedings of the Court of Justice required urgent amendment and pointed out that the Supreme Court had been based on a model 'hitherto unknown' at the Cape. It was therefore necessary to arm the judges with extensive powers for the regulation of their own proceedings. He stated that the judges would fully understand the limits of this authority and would refrain from exceeding it. He informed the Governor that he would be precluded from passing ordinances to regulate those matters which the Charter had expressly placed under the authority of the Supreme Court.²⁷ He strongly urged the members of the Council of Advice and the judges to avoid all encroachments on the distinct functions which had been committed to each of them.

2.3.4. CIRCUIT COURTS

The Secretary for Colonies informed the Governor that he had been entrusted with the authority to decide when and where the circuit courts were to be held.²⁸ However this was subject to the requirement that at least two circuits were to be held every year.²⁹ In appointing the circuits, the Governor would have to pay due regard to the convenience of the inhabitants and to the 'health and proper comforts' of the circuit judges.³⁰

26. Theal, loc.cit., p.259

27. Theal, loc.cit.

28. Theal, loc.cit., p.260.

29. Section 39 of the Charter of Justice.

30. Theal, loc.cit.

He explained that it was 'not intended that the Chief Justice should ever act as a judge of the circuit'.³¹ This duty was to be discharged by the three puisne judges in rotation. He stated that;³²

'It is to be hoped that they will at all times be able to arrange the choice of circuits by mutual agreement in such a manner as may best promote the public interest and their own common convenience. If it should be necessary to have recourse to a positive rule for the decision of any such question, it will be understood that each judge will choose his circuit according to seniority, but in such a manner that each judge may in each year perform the same number of circuits as his colleagues.'

He directed that no two circuits were to be held at the same time because it was necessary to retain three judges for duty in the Supreme Court.³³ The circuit courts were to be constituted as courts of record and within their districts they would exercise the same jurisdiction, powers and authority as the Supreme Court.³⁴ Criminal cases were to be tried by the circuit judge and a jury of nine men. However where it was not possible to summon a jury of nine, six men would suffice.³⁵ Civil cases were to be tried and decided by the circuit judge sitting alone. In civil cases, where the amount in dispute exceeded one hundred pounds, an appeal would be allowed to the Supreme Court.³⁶ In cases where the amount in dispute was less than one hundred pounds, the circuit judge was given the discretion to permit an appeal if he considered the issues to be of such importance as to render it proper.³⁷ In cases

31. Theal, loc.cit.

32. Theal, loc.cit.

33. Theal, loc.cit.

34. Section 40 of the Charter of Justice.

35. Sections 36 and 41.

36. Section 42.

37. Section 43.

of appeal fourteen days notice would have to be given and sufficient security would have to be lodged.³⁸ Execution would then be stayed pending the decision of the Supreme Court. The Supreme Court was not authorized to receive any new evidence on appeal.³⁹ Furthermore when it appeared to the judges that a pending matter could be more conveniently heard in either the Supreme Court or in another circuit court, they could order that the case be removed to the court in question.⁴⁰ Finally he informed the Governor that he was prepared to allow an annual amount of six hundred pounds for the expenses incurred by the circuit judges and he directed that the allowance had to be disbursed in proportion to the length and expense of the circuit.⁴¹

2.3.5. TRIAL BY JURY

The Charter provided for the introduction of trial by jury in criminal cases.⁴² He explained that certain qualifications respecting the number and unanimity of the jurors had been introduced in conformity with the recommendations of the Commissioners. Criminal cases were to be tried by a judge and jury of nine men and the jurors would have to reach an unanimous verdict. In the more remote districts where it was probable that a sufficient number of jurors might not be found, criminal cases could be tried by a judge and six jurors. He pointed out that the Charter had not laid down rules respecting the qualifications of the

38. Section 44.

39. Section 44.

40. Section 45.

41. Theal, loc.cit.

42. Sections 36 and 41.

jurors, nor the means for enforcing their attendance. It was felt that local information was necessary in this respect and it was accordingly decided to leave the regulation of these matters to the Governor and his council.⁴³ However he felt it necessary to state that;⁴⁴

'The office of juror should be confined to such of the inhabitants as, from their education, property and condition in life, would be best qualified to understand and perform correctly this important duty.'

He pointed out that the Charter had provided for the possibility of trial by jury in civil cases.⁴⁵ However he considered this to be a matter which required great caution and he directed that the opinion of the judges should be obtained before proceeding with its implementation. He informed the Governor that any law which proposed to extend jury trial to civil cases would first have to be submitted to the King for his approval.

The institution of a grand jury was not expressly mentioned by the Commissioners in their report. However he informed the Governor that he was disposed to infer that in their general recommendations on the subject of trial by jury, 'the Commissioners must be understood as referring to the office of grand jury and not to that of petit jury alone'.⁴⁶ He had no doubt that gentlemen could be found in Cape Town and its immediate vicinity to fill the office. However he suggested that even at Cape Town it would be necessary to reduce the number of grand jurors from the

43. Theal, loc.cit., p.261.

44. Theal, loc.cit.

45. Section 48 of the Charter of Justice.

46. Theal, loc.cit., p.267.

number required in England. He considered that it would be impractical to attempt to convene a grand jury in the more remote districts. He concluded by stating that if a grand jury was to be established, it would have to be limited to Cape Town for the time being.⁴⁷

2.3.6. PUBLIC PROSECUTIONS

He pointed out that the Commissioners had not dealt with the office of public prosecutor as they had recommended that the English practice should be followed when prosecuting offenders.⁴⁸ He explained that according to the English practice cases were usually prosecuted by the injured party.⁴⁹ He felt that the difficulty in adopting the English form of prosecution would prove to be insuperable and supported this opinion by stating the following;⁵⁰

'It is obvious that the great mass of inhabitants cannot have either leisure or inclination for such change and that the participation of private men in prosecutions would be regarded, not as the assertion of an important privilege, but only as an unrequited and invidious burden. It is further to be considered that this peculiar principle of English Law supposes the existence of a numerous magistracy dispersed throughout every part of the Kingdom, to whom the private prosecutor can at all times resort with little inconvenience. It requires also a large body of inferior officers of justice under the immediate command of the magistrates. Now this complex machinery is not at present to be found in the colony, nor have I any ground to suppose that the necessary materials from which it might be constructed could be found there.'

47. Theal, loc.cit., p.268.

48. Theal, loc.cit., p.266.

49. Theal, loc.cit., p.267

50. Theal, loc.cit

He informed the Governor that he had accordingly advised the King to constitute the Attorney-General of the Cape of Good Hope the public prosecutor of all offences committed in the colony.⁵¹ He explained that the employment of a public prosecutor was not dependent on whether or not a grand jury was to be introduced and he stated that throughout the West Indian Colonies the form of trial by grand and petit jury was maintained, but in each of those colonies it had been found necessary to entrust the conduct of all public prosecutions to the Attorney-General. The experiment had proved to be successful and he had decided to introduce the system to the Cape. He informed the Governor that one of the earliest duties of the council of government at the Cape would be to frame the necessary laws for the regulation of criminal procedure in order to adapt it for use in the Supreme and circuit courts. He laid down the following guide-lines;⁵²

'The duties of a public prosecutor must...be carefully distinguished from the subordinate ministers of justice. It is not intended that the Attorney-General should act as a justice of the peace in England. The duty of taking the preliminary examinations will belong to the police magistrate in Cape Town and to the justices of peace in the country districts. Still less is it proposed that the Attorney-General should act as the Fiscal would seem hitherto to have acted, in the capacity of a superior police officer. His duty as public prosecutor will in general be to receive, from the subordinate officers of criminal justice, written reports of all the

51. Theal, loc.cit., p.268.

52. Theal, loc.cit., p.269.

examinations and preliminary proceedings, taken by them, in cases of so grave a nature as not to be cognizable by the summary jurisdiction of the justice of the peace. Reports of these higher offences will be transmitted to him from every part of the colony and it will be his duty to decide whether it be fit to prosecute the offender in each particular case. If he should decide to prosecute, he will, in all cases of trial before the Supreme Court, conduct the prosecution through all its stages in person. If the trial should take place in the circuit courts the prosecution will be conducted by the clerk of the peace for the district in which such circuit court may be held, unless the Attorney-General should appoint some other person to represent him in any particular case.'

He directed that the clerk of the peace at Cape Town and the clerks of the peace in the country districts be placed under the control of the Attorney-General.⁵³ The clerks of the peace would be required to maintain a continual correspondence with the Attorney-General through the office of the clerk of peace at Cape Town. In conducting prosecutions, the relationship between the clerk of the peace at Cape Town and the Attorney-General would be the same as that between the Treasury solicitors and the Attorney-General in England. He suggested that guidance should be sought from the Law of Scotland where the office of public prosecutor had been in existence for a long time.⁵⁴

2.3.7. THE RIGHT OF APPEAL TO THE PRIVY COUNCIL

The Charter made provision for an appeal from the Supreme

53. Theal, loc.cit.

54. Theal, loc.cit., p.270

Court to the Privy Council.⁵⁵ The right of appeal was restricted to civil cases where the amount in dispute exceeded one thousand pounds. Application for leave to appeal had to be made by way of petition to the Supreme Court and had to be brought within fourteen days after judgment. The judges were given a discretion to suspend execution of the judgment pending the outcome of the appeal. In either case one or other of the parties could be required to furnish security to the satisfaction of the court. In all cases the appellant would be required to furnish security for the prosecution of the appeal and for such costs as might be awarded by the Privy Council. The Supreme Court would be obliged to allow the appeal if the appellant furnished security within three months from the date of the petition for leave to appeal. Finally the Charter specifically bound the Supreme Court to follow the judgments and orders of the Privy Council.⁵⁶

2.3.8. THE SHERIFF

He considered the sheriff to be the first in rank and importance amongst the subordinate officers of the court.⁵⁷ He stated that the office had been based on the corresponding office in England and the sheriff's duties would correspond to those performed by the sequestrators.⁵⁸ However he pointed out that the court was entrusted with the authority to prescribe the course of the sheriff's duties. The sheriff would therefore have to consult the rules of court and the Charter for guidance. The sheriff and his

55. Section 51.

56. Section 53.

57. Theal, loc.cit., p.263.

58. Theal, loc.cit.

deputies would be required to execute the process of the Supreme and circuit courts.⁵⁹ They would also be required to receive and detain in prison all persons who were committed to their custody by the judges.⁶⁰ He informed the Governor that he would have to renew the sheriff's appointment on an annual basis and in conformity with his instructions. He pointed out that these provisos were necessary because the sheriff would receive large sums of money. He accordingly directed that the sheriff would have to furnish adequate security before taking up office. The sheriff would be required to furnish his own security of three thousand pounds and he would have to obtain two sureties for an additional three thousand pounds.⁶¹ The judges would be required to frame a rule of court, requiring the sheriff on the first day of each quarter of a year to exhibit on oath an account of his receipts and payments during the last preceding quarter, and requiring him to pay the balance into court.⁶² The court would then grant him a certificate. When the sheriff applied to have his appointment renewed he would have to produce the quarterly certificates for the preceeding year.

2.3.9. THE REGISTRAR

The Charter provided for the appointment of a registrar or prothonotary and keeper of the records.⁶³ His duties were to correspond with those performed by the prothon-

59. Section 29 of the Charter of Justice.

60. Section 29.

61. Theal, loc.cit., p.264

62. Theal, loc.cit.

63. Section 16 of the Charter of Justice.

otary in the courts at Westminster.⁶⁴ The registrar would be required to be continually present during the sittings of the Supreme Court and he had to record all the judgments and proceedings.⁶⁵ The court records would be deposited in his office and he would be responsible for the delivery of copies to persons who were entitled to receive them. The registrar would be required to issue the process of the court and he would receive the return of service from the sheriff. Finally he would be expected to carry out all the duties which were assigned to him in the rules of court.

2.3.10. THE MASTER

The Charter provided for the appointment of a master of the Supreme Court.⁶⁶ His duties were to correspond with those performed by the master in the courts at Westminster.⁶⁷ He explained that the master would act as the general referee of the court for the purpose of examining accounts, making computations or investigating any other controverted matter of fact in which his co-operation and assistance might be required.⁶⁸ The master would also be expected to carry out any other duties which were delegated to him by the court. He pointed out that the Commissioners had recommended that the master should act as the commissioner at the court of requests⁶⁹ and he instructed the Governor to carry this recommendation into effect if it proved practical.⁷⁰

64. Section 17.

65. Theal, loc.cit.

66. Section 16 of the Charter of Justice.

67. Section 17.

68. Theal, loc.cit.

69. A local court for small claims.

70. Theal, loc.cit., p.265

2.3.11. MINOR OFFICERS OF THE COURT

The Charter authorized the Chief Justice to appoint officers necessary for the administration of justice in the Supreme Court.⁷¹ However it stipulated that no new appointments were to be made without first obtaining the Governor's approval. He informed the Governor that in his opinion no more than two officers of the 'higher class' would be required.⁷² He had also made allowance for the employment of certain 'inferior officers' in the character of interpreters, messengers and door keepers. He directed that the number of officers required and their remuneration had to be arranged by the Chief Justice with the concurrence of the Governor. He stressed the importance of preventing 'the accumulation of petty expenses of this nature'.⁷³ He informed the Governor that in addition to conducting prosecutions, the clerks of the peace would have to perform the duties of registrar and master in the circuit courts.

2.3.12. LEGAL PRACTITIONERS

The Supreme Court was given control over the admission and suspension of the legal practitioners.⁷⁴ Candidates for admission to the Bar would have to produce evidence that they had been admitted to either the English, Irish or Scottish Bars, or that they held doctors degrees from the universities of Oxford, Cambridge or Dublin.⁷⁵ The court

71. Section 16 of the Charter of Justice.

72. Theal, loc.cit.

73. Theal, loc.cit.

74. Sections 19-23 of the Charter of Justice.

75. Section 19.

was also authorized to admit local advocates who had been in practise in the Court of Justice prior to the promulgation of the Charter.⁷⁶ Candidates for admission as attorneys, solicitors or proctors would be required to produce evidence that they had been admitted to practice in either the English, Irish or Scottish courts.⁷⁷ Provision was also made for the admission of candidates who had qualified locally as attorneys, solicitors and proctors.⁷⁸ The court was also authorized to admit attorneys, solicitors and proctors to act as advocates on a temporary basis.⁷⁹

2.4. APPOINTMENTS AND FINANCIAL ARRANGEMENTS

The Charter designated Sir John Wylde as Chief Justice, and William Menzies, William Westbrooke Burton and George Kekewich as puisne judges.⁸⁰ Wylde, Burton and Kekewich were English barristers who had held judicial office and Menzies was appointed from the Scottish Bar. Anthony Oliphant, a Scottish advocate who had subsequently qualified to practise at the English Bar, was appointed Attorney-General. The office of sheriff, registrar and master were filled by P G Brink, Thomas Bowles and Clerke Burton respectively.

In June 1827 the Secretary for Colonies informed the Governor that thirty thousand pounds had been set aside for the judicial establishment.⁸¹ The Chief Justice was to

76. Section 20.

77. Section 21.

78. Section 22.

79. Section 26.

80. Sections 14 and 15.

81. Theal, *op.cit.*, vol.32, p.8. Letter dated 14 June 1827.

receive an annual salary of two thousand five hundred pounds and the puisne judges and the Attorney-General were each to receive fifteen hundred pounds. He stressed the importance of keeping within the budget and suggested that, if necessary, the Governor should abstain from filling all the positions in the judicial establishment. However these instructions were soon shown to be unrealistic and the expense incurred by the judicial establishment was to play a major role in the future development of the Supreme Court. Two days after he had issued the instructions, the Secretary for Colonies received a letter from the Chief Justice and the Attorney-General complaining of considerable pecuniary loss and inconvenience.⁸² They explained that they had been obliged to relinquish their professional income on receiving their nominations and pointed out that their salaries were only to commence on the day of their embarkation. Menzies and Burton took up the issue in July 1827, and after detailing their financial difficulties, they suggested that their salaries should commence from the dates of their respective nominations instead from the time of their embarkation.⁸³ The Secretary for Colonies relented and arrangements were made to issue the judges, the Attorney-General and the registrar an advance of half their annual salaries. However he stipulated that no further pecuniary facilities would be granted. In August 1827 he informed the Chief Justice that his request for law books had been turned down as it exceeded the limits of the contingent expenditure which had been allowed for the

82. Theal, *loc.cit.*, p.30. Letter dated 16 June 1827.

83. Theal, *loc.cit.*, p.157. Letter dated 4 July 1827.

judicial establishment.⁸⁴

There was some criticism in the House of Commons when Menzies' appointment was announced. One of the members stated that;⁸⁵

'It was not safe to send out as judges, even to places where the civil law was administered, any persons not practised in the English law or not habituated to trial by jury and the English law of evidence. It was impossible that any person educated at the Scotch Bar could obtain a competent knowledge of the civil law.'

Mr Wilmot Horton rose in defence of the appointment and stated that the government had not lost sight of the principle of sending out persons to administer the law in the colonies who were thoroughly imbued with the principles of English Law. He explained that;⁸⁶

'It was at the time thought necessary and indeed it was recommended by the highest authorities in this country to send out a gentleman acquainted with the practice of the civil law; it being likely that questions might arise in which his knowledge of that branch of jurisprudence would be of the greatest utility.'

Burton was also dissatisfied that Menzies had been placed above him as the senior puisne judge. In June 1827 he pointed out to the Secretary for Colonies that his name had originally appeared as the senior puisne in the draft of the Charter.⁸⁷

By the end of November 1827 all of the judges had arrived at Cape Town and were 'hard at work'.⁸⁸ However the Cape Colonial Secretary reported that they were prevented from

84. Theal, loc.cit., p.488. Letter dated 29 August 1827.

85. Theal, loc.cit., p.47. Debate conducted on 29 June 1827.

86. Theal, loc.cit., p.48.

87. Theal, loc.cit., p.22. Letter dated 15 June 1827.

88. Theal, op.cit., vol.34, p.132. Letter dated 22 November 1827.

doing much in the way of progress as, apart from Kekewich, they were ignorant of the local regulations and practice.⁸⁹ He informed the Secretary for Colonies that the judges had requested that the opening of the Supreme Court should be postponed pending the establishment of the rules of procedure. However he had informed the Chief Justice that in order to pay the 'new servants' it was necessary to 'get rid of the old' and that the government could not afford to pay both, even for a few months.⁹⁰

2.5. PRE-NATAL GROWING PAINS

The Secretary for Colonies' directive urging the members of the legislature and the judiciary not to encroach on one another's function was put to the test before the Supreme Court opened its doors. The conflict arose out of the proposals to establish a new system of inferior courts in the colony. This was a function which had been assigned to the Governor and the Council of Advice.⁹¹ However the legislature was obliged to obtain the Chief Justice's advice on the rules of procedure which were to apply in these courts.⁹² In November 1827 the Governor submitted the legislature's proposals for the creation of inferior courts to the Chief Justice and requested his assistance in drafting the necessary rules of procedure.⁹³ He informed the Chief Justice that although the subject had been entrusted to the legislature, he would welcome the judges' opinion on the proposals. He stated that the

89. Theal, loc.cit.

90. Theal, loc.cit.

91. Section 49 of the Charter of Justice.

92. Section 50.

93. Theal, loc.cit., p.116. Memorandum dated November 1827.

proposals had been based on the English legal system and pointed out that the express terms of the Charter and the directives of the Secretary for Colonies had been clear on this point. The proposals envisaged the establishment of a network of county courts and included trial by jury in criminal cases.

In December 1827 the Chief Justice delivered the unanimous opinion of the judges on the subject.⁹⁴ They stated that the Charter had not invested the legislature with the authority to erect a system of jury trials in the inferior courts and they pointed out this form of trial was only imperative in the Supreme and circuit courts. In any event, they were of the opinion that it was highly questionable whether such a system of jury trial could be advantageously adopted or efficiently conducted in the inferior courts.⁹⁵ The judges felt that they were better qualified to devise the composition of the inferior courts. They recommended that justices of the peace be appointed throughout the colony for the purpose of disposing of petty criminal offences and minor civil matters. They proposed that the colony be divided into four districts and recommended that a resident magistrate be stationed in each for the disposal of civil cases where the amount in dispute did not exceed thirty pounds. Criminal cases would be tried by district benches to be composed of the magistrate and four members. The district benches would have jurisdiction to try all offences not punishable by the payment

94. Theal, *loc.cit.*, p.172. Letter dated 5 December 1827.

95. Theal, *loc.cit.*, p.175.

of a fine exceeding ten pounds or imprisonment exceeding three months.

However the members of the legislature were not prepared to relinquish the right to devise the structure of the inferior courts in the manner which appeared to them best suited to the needs of the colony. Although they felt that the judiciary lacked local experience, they bowed to the judges' opinion that jury trials were not feasible and decided to meet them half way. The recommendation to appoint justices of the peace was implemented on 11 December 1827.⁹⁶ District benches were rejected in favour of resident magistrates courts with limited jurisdiction to try both civil and criminal cases.⁹⁷ In civil cases the magistrates' jurisdiction was limited to ten pounds and in criminal cases to the trial of offences not punishable by a fine exceeding five pounds, imprisonment exceeding one month and whipping privately in prison. Provision was also made to allow the magistrates to inflict a more severe punishment where it was expressly authorized by any special law or ordinance.

2.6. CONCLUSION

On 10 December the stage was set on a new era when the Governor announced that the Cape Supreme Court would be opening on 1 January 1828.⁹⁸ The Charter of Justice was read to a distinguished audience of local dignitaries

96. Ordinance No. 32.

97. Ordinance No. 33.

98. Proclamation dated 10 December 1827.

who had assembled at Government House and the judges took the oath of allegiance.⁹⁹ At the same time it was announced that the Court of Appeal and the Court of Justice were to be abolished. Reaction to the institution of the Supreme Court was generally favourable. In his closing address in the Court of Justice, Sir John Truter referred to the Charter as a 'bulwark of civil liberty'.¹⁰⁰ However some reservations had been expressed as to whether trial by jury would promote justice. Theal accurately assessed the prevailing mood by posing the following conundrum;¹⁰¹

'In the eye of the law the life of a Kaffir or a Bushman was as sacred as that of the Chief Justice himself, but could it be expected that nine men would always agree to subject a European to sentence of death for shooting a Kaffir or Bushman thief no matter how clear the evidence might be or how the judge might sum it up?'

The conundrum was finally answered in 1879 when the accused were acquitted by the juries in what was to become known as the Koegas atrocities.¹⁰²

There can however be no doubt that with the birth of the Cape Supreme Court, the policy of anglicization took a giant leap forward. The court had simultaneously given birth to an unseen mechanism which was neither spelt out in the Charter of Justice nor in the policy directives of the Colonial Office. This mechanism was to permeate into the reasoning behind the law and finally became

99. *The Colonist*, 13 December 1827

100. *The Colonist*, 3 January 1828

101. G.M. Theal, *The History of South Africa*, Facsimile repr., Cape Town : Struik, 1964, vol.5, p.491.

102. See 8.3.

established as one of the sources of the law itself. The silent mechanism, better known as judicial precedent, went largely unnoticed in the early years of the growth and development of the Cape Supreme Court, but today it loudly proclaims itself as the court's greatest legacy.

CHAPTER THREE

3. THE EXPERIMENTAL PERIOD

3.1. INTRODUCTION

The period 1828-1834 can best be described as experimental. It highlighted the inflexibility of the Charter of Justice and was characterized by the strained relationship which developed between the Governor and the Chief Justice. This relationship, together with considerations of economy, made it necessary to amend the Charter. Although the Charter had separated the executive from the judiciary, the relationship still had to be clearly defined in practice. This had already become apparent during the skirmish which had developed over the establishment of the inferior courts. The Governor had certain misgivings over the new innovations and was determined to retain a firm control over the judiciary. The judges, however, were equally determined to exert their independence and were not prepared to brook any interference from the Governor. The strained relationship, which was initially restricted to the Governor and the Chief Justice, soon spilled over and encompassed the legislative authority and the judiciary.

The first serious clash occurred in the Governor's

Council of Advice, to which the Chief Justice had been appointed. As a result, the Chief Justice was dismissed from the council and only regained membership to its successor in 1854. The second clash arose out of the patronage over the officers of the court. The Chief Justice insisted on the right to exercise this patronage but the Governor was reluctant to defer to his claim. The third dispute concerned the language abilities of the jurors. The Chief Justice and Judge Menzies insisted that the Charter required the jurors to have a knowledge of English and refused to recognise that the Governor and the Council of Advice could legislate on the issue. Finally, the judges contested the Governor's authority to extend the jurisdiction of the Supreme Court beyond the colonial boundaries. They were of the opinion that this could only be achieved through an Act of the British Parliament.

Under Sir Lowry Cole's administration the relationship between the Governor and the Chief Justice reached breaking point and almost culminated in the Chief Justice's dismissal. Sir John Wylde's relationship with his eldest daughter was made the subject of a confidential inquiry. It was alleged that he had made her pregnant. Although the evidence was inconclusive, it did not deter the Governor from recommending that the Chief Justice be removed from office. His opinion

of Sir John Wylde is vividly described in the following extract taken from a private letter to the Secretary for Colonies;¹

'He is a person of low and vulgar habits and in the right common occurrences of life, he is so inconsistent and mysterious that it is not possible to avoid suspecting that he has something to conceal or some latent object in view.'

Fortunately the relationship between the Governor and the Chief Justice was diffused as the Governor was recalled soon after the inquiry.

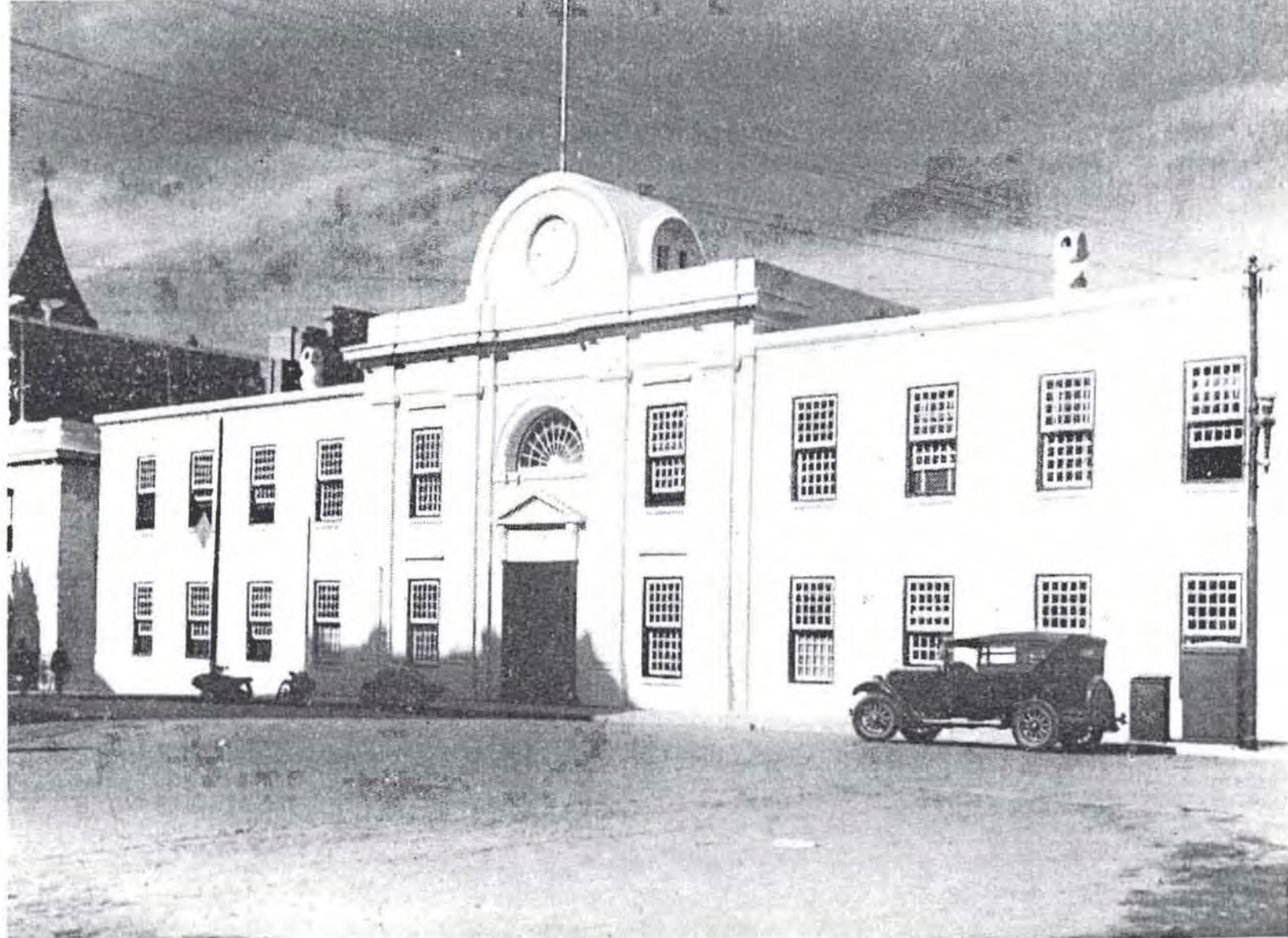
The relationship between the judges was also troubled. The Chief Justice believed that Judge Menzies had taken a hand in instigating the rumours concerning his relationship with his daughter. Judge Burton, who harboured a grudge against Menzies as a result of his being preferred as the senior puisne, contested the right to first choice of circuit. On the Bench the judges were at odds over whether the jurors were required to have a knowledge of English. When the issue came up before the full Bench the judges were equally divided. The Chief Justice and Judge Menzies only managed to secure a majority decision in favour of their view when Judge Kekewich withdrew his opposition in accordance with the practice at Westminster. Burton refused to be bound by the decision and he continued to conduct his circuits without insisting that the jurors had to have an

1. G.H. 23/10. Letter dated 27 June 1833.

understanding of the English language. Off the Bench the judges were divided over the term 'Legislative Council' which appeared in the Second Charter of Justice. Menzies was of the opinion that the term could be interpreted so as to include the Council of Advice. The majority of the judges held the opposite view. As a result, it was not possible to promulgate the Second Charter until 1834 when a Legislative Council was established. Finally, owing to economic considerations it became necessary to reduce the Bench from four to three judges and the axe fell on Burton.

The period 1828-1834 was also a period of methodical change and the judges were at the helm of the process. They had to set up the Supreme and circuit courts and were responsible for drafting the rules of procedure. They were called upon by the Governor to give advice on many diverse matters and were responsible for drafting the major ordinances of the day. Furthermore, the Chief Justice was required to examine all the draft ordinances in order to certify whether they were in accordance with the fundamental laws of the colony.

Many of the problems were resolved by the Second Charter of Justice which was promulgated in 1834. The Bench was reduced from four to three judges and the Chief Justice was required to take his turn of circuit duty. He was also relieved of his patronage over the



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minor officers of the court. In future any one of the judges could be called upon to certify whether the draft ordinances contained any legal impediments. Although the Chief Justice had been reduced in status, the judges proved their mettle by tenaciously resisting all attempts to undermine their independence. At the same time the judges were hesistantly laying down the foundations of judicial precedent.

3.2. THE FIRST SITTING OF THE SUPREME COURT

The Supreme Court opened its doors for business on 1 January 1828.² At one o'clock the judges, in their robes, took their seats upon the bench. Wigs had been deemed necessary but none were available. The Chief Justice read the Charter of Justice and the judges took the oath of office. The Attorney-General was then called on to read the letters patent appointing him to office and he was directed to take his seat at the head of the Bar. He was followed by the assembled advocates and attorneys who were directed to take up their positions at the bar and side bar. Before addressing the audience, the Chief Justice announced the appointment of the master, acting registrar and interpreter. He commenced his address by stressing the independence of the judiciary and stated that the judges were not subject to any form of governmental control.³ He pointed out that this

2. For a history of the courthouse, see C.Geyser, The History of the Old Supreme Court Building, Johannesburg : Africana Press, 1980.

3. The Colonist, 3 January 1828.

was a privilege which was 'unknown in the history of the criminal jurisprudence of the colonies'.⁴ He went on to trace the background of each of the judges and explained that their varied experience would 'strengthen the hands of the Bench'.⁵ He drew attention to the fact that the colonists would have the benefit of trial by jury in criminal cases and stated that in civil cases the court would have 'every assistance that could be desired from experience, from sound principles, extensive knowledge and the decisions of past times'.⁶ He explained that the court was authorized to admit the practitioners of the Court of Justice and he welcomed the experience which they would bring to the Supreme Court. He stated that the court would continue to conduct cases under the procedure which had been in use in the Court of Justice, because the Charter had directed that the new rules of procedure had to be published three months before they could take effect. He then proclaimed a number of rules relevant to the proposed civil terms and criminal sessions. Civil terms were to be held in March, June, September and December and there were to be eight criminal sessions every year. The first criminal session involving trial by jury was to be held on 15 May 1828. The court would also sit during vacation and provision was made for one of the judges to attend at chambers. The court was then adjourned to 10 January 1828 in order to hear applications for

4. loc.cit.

5. loc.cit.

6. loc.cit.

the admission and enrolment of the legal practitioners.

On 10 January 1828 the Chief Justice invited the Attorney-General and nine advocates to take the oath⁷ and they were duly admitted.⁸ There were thirteen applications for admission as attorneys, of which twelve were successful and one was refused on a technical point.⁹ In dealing with the unsuccessful application, the Chief Justice explained that it was in the interests of the administration of justice to increase the number of attorneys, but the court could not form any rule 'because by the Charter, the rules did not take effect until three months after the date of promulgation'.¹⁰

3.3. RULES OF COURT

The Governor, who was understandably reluctant to concede too much independence to the judiciary, criticized a number of the rules of court which had been promulgated on 1 January 1828.¹¹ He felt that the judges had failed to heed the Secretary for Colonies' directive and had exceeded their authority by usurping legislative powers.¹² He referred in particular to the rule whereby the judges had granted themselves immunity from being sued in civil actions.¹³ He complained to the Secretary for Colonies and stated that;¹⁴

'The practice and decisions of the new court and the strained construction of the Charter seem

7. The records do not indicate the form of oath which was administered. See also Ex Parte Kriger 1945 CPD 254.

8. The Colonist, 17 January 1828.

9. loc.cit.

10. loc.cit.

11. B.J. Van de Sandt, Rules, Orders & C. touching the forms and manner of proceeding in Civil and Criminal Cases..., Cape Town : A.S. Robertson, 1835.

12. See 2.3.3.

13. B.J. Van de Sandt, op.cit., rule No. 9.

14. G.H. 23/8. Letter dated 19 May 1828.

calculated to reflect a revolution in the manner which appears to me open to objection; insomuch as it augments the uncertainty of the law and gives more than judicial power to the court.'

Meanwhile the judges promulgated rules for the regulation of criminal proceedings,¹⁵ the sheriff's duties¹⁶ and the master's office.¹⁷ On the last day of the March term they dealt with the question of pauper proceedings. The court had been inundated with petitions which had been admitted under the 'pro deo' rules of the Court of Justice. It was therefore necessary for the judges to promulgate rules for the purpose of regulating the proceedings in actions by or against poor persons. In order to obtain leave to sue or defend as a pauper under the new rules, the applicant had to produce affidavits to the effect that he was not worth ten pounds. He was also required to produce a certificate from an advocate to the effect that he had a good cause of action or defence. The court would then appoint an advocate and an attorney to assist the applicant in forma pauperis.¹⁸

3.4. PREPARATIONS FOR TRIAL BY JURY

The Charter of Justice had not expressly provided for the institution of a grand jury. However the Governor felt that there was no obstacle to instituting a grand jury at Cape Town and based his opinion on the Secretary

15. Promulgated on 24 and 31 January 1828.

16. Promulgated on 5 January 1828.

17. Promulgated on 27 March 1828.

18. The Colonist, dated 3 April 1828.



The old courtroom



A gracious wooden staircase in the old building

for Colonies' directive of 5 August 1827.¹⁹ He referred the matter to the judges for advice and his recommendation was accepted by a majority of the judges. Provision was accordingly made for the establishment of a grand jury to serve Cape Town and the Cape district. An Ordinance for determining the qualifications of persons liable to serve on grand and petit juries was promulgated on 4 February 1828²⁰ and a list of thirty-four grand jurors appeared in the *Colonist* on 3 May 1828. Menzies and Burton were given the task of drafting an Ordinance for the regulation of criminal procedure, which was promulgated on 25 January 1828.²¹ The Ordinance made inroads in matters of arrest, preliminary examination, prosecution and bail, but was nonetheless passed by the Council of Advice with only a few alterations 'favourable to the liberty of the subject'.²² It was also necessary to make alterations to the interior of the courthouse in order to accommodate the jurors. The following description of the proposed alterations appeared in the *Colonist*;²³

'The bench is to be raised at least three feet higher than it was formerly, which is a very great improvement, and this elevation will in some degree compensate the public for the room they will lose by the intended arrangement. At the back of the bench will be a large fixed screen of teak wood with the Royal Arms at the top. Immediately under the judges will be arranged the officers of the court... on the spectator's left

19. See 2.3.5.

20. Ordinance No. 41.

21. Ordinance No. 40.

22. G.H. 23/8. Letter dated 19 May 1828.

23. The Colonist, 19 April 1828.

side the grand jury, and on the right the sheriff's and petit juror's boxes. In front... will be small boxes for the interpreter, witness, and crier...further back, and occupying the centre of the apartment, the advocates and attorneys seats; behind which will be two boxes, one to be used as a bail dock and the other for prisoners.'

On 9 and 10 May 1828 the grand and petit juries were sworn in, and on 15 May the first criminal session incorporating trial by jury opened at Cape Town. The Bench consisted of the Chief Justice, Menzies and Kekewich.²⁴ In his opening address the Chief Justice stunned the packed audience by announcing that the judges had decided that the jurors would have to have a sufficient understanding of English to enable them to follow the proceedings without the assistance of an interpreter. He pointed out that the ruling had not been unanimous and intimated that the court would be glad to have the matter fully argued before it when all the judges were present.

The ruling proved to be very unpopular and the press commented that no precedent had been cited in support of the restriction. The Colonist reported that it had been hoped that the jurors would be appointed as in England from those returned on the panel, 'subject only to the right of challenge vested in the parties'.²⁵ According to the editorial, the colonists had looked forward to the institution of trial by jury with 'intense anxiety'.²⁶ It was an institution which 'should

24. Burton had left Cape Town to take the eastern circuit.

25. The Colonist, 20 May 1828.

26. loc.cit.

give them the fullest security for their lives, their liberty and their property'.²⁷ The editorial concluded by stating that it was necessary to pause and to consider before steps were taken which would 'deprive three fourths of the population of the blessing for which they had thirsted and in which the Royal Charter and the Ordinance clearly intended that all should participate'.²⁸ The restriction did not cast a complete damper over the proceedings. An anonymous contributor to the *Colonist* expressed the following sentiment;²⁹

'I witnessed on thursday last the opening of the first criminal court which has been known to this colony to have received the assistance of a jury. As an Englishman, the whole proceedings were to be profoundly interesting; and I feel, while writing, a return of that gush of gratitude which rushed to my heart when I beheld the jury assembled for the purpose of executing these functions, in an honest discharge of which the best interests of the community are centered...The predominant feeling of every individual was one of comfortable and settled satisfaction.'

On 3 June 1828 the Chief Justice attempted to sweeten the pill by stating that he had known juries for a long time, and with an experience of twenty-six years, he could say of both the grand and petit juries that he had never seen their respective functions better performed.³⁰ He also referred to an application which had been made to exclude persons of mixed race from attending the sittings of the court and expressed satisfaction

27. loc.cit.

28. loc.cit.

29. loc.cit.

30. *The Colonist*, 3 June 1828.

that the application had been discontinued and would not occur again.³¹ However this did not detract from the fact that men of mixed race had been excluded from the jury lists.

The Sovereign was petitioned to have them admitted. The petitioners pointed out that when the juries were established 'the local legislature did not judge fit to qualify the few respectable coloured men who professed Mohammedism in Cape Town to sit in the jury box'.³² It was also pointed out that the officers entrusted to frame the jury lists 'may have yielded to ancient prejudice' because they had not included Hottentots or men of mixed race, who were lawfully qualified to sit by being payers of the specified taxes and by holding the Christian faith.³³ On 14 July 1828 an Ordinance was promulgated which removed the legal disabilities to which the Khoikhoi and other free persons of colour were subjected.³⁴ The Ordinance, which was drafted by Judge Burton, was 'entirely in accordance with the views of the authorities but contrary to the view of the majority of the white inhabitants at the Cape'.³⁵ It was not uncommon thereafter for persons of mixed race to sit as jurors at Cape Town. However the 'majority view' remain unchanged. This was demonstrated thirty years later when Judge Cloete caused general dismay by appointing two coloured men to sit on a jury during the circuit court sessions which were held at Burghersdorp in 1859.³⁶

31. loc.cit.

32. loc.cit.

33. loc.cit.

34. Ordinance No.50. The ordinance was only confirmed by the King on 15 January 1829.

35. F.Y.St.Leger, Sir W.W.Burton, South African Law Journal, vol.52, 1935, p.260.

36. A.F.Hattersley, Early days of judicial circuits in South Africa, Africana Notes and News, vol.13, 1958/9, p.127.

3.5. ROBES AND OX-WAGONS

The judges were of the opinion that circuit courts should be held in all the major towns of each district in the colony, and they recommended that the colony be divided into three distinct circuits. The Governor accepted the advice and the circuits were proclaimed on 28 February 1828. The western circuit encompassed the sub-district of Clanwilliam and the districts of Swellendam and George. The eastern circuit encompassed the districts of Uitenhage, Albany, Somerset, Graaff-Reinet and the sub-district of Beaufort. The midland circuit encompassed the remaining districts of George and Swellendam. Menzies chose the western, Burton the eastern, and Kekewich was left with the midland circuit. Detailed plans for the journeys were made in consultation with D.Cloete, the former secretary to the defunct Court of Justice, and on 9 April 1828 the judges were informed that a warrant had been issued in their favour for three hundred pounds, 'being half the amount allowed for travelling expenses and charges for lodging on circuit'.³⁷ The financial arrangements were an improvement on the original plan which had provided the judges with an official claim on the hospitality of the inhabitants whose houses were situated on the circuit routes. The new arrangement drew forth the following comment in the press;³⁸

37. C.O. 4892. Letter dated 9 April 1828.

38. The Colonist, 20 March 1828.

'This is a plan decidedly preferable to the former, but we are aware that the feelings and prejudices of the inhabitants may render it difficult to execution. We hope that the authorities of the country districts have been or will be instructed to provide for the reception of the judges where it may be paid for, and that their lordships may be saved from the necessity even of declining to receive hospitality which they might deem burthensome on any other terms.'

Judge Burton left Cape Town on 15 April in order to take the eastern circuit, and on 1 May 1828 he opened the proceedings at Uitenhage. He outlined the duties and advantages of trial by jury and described it as the 'great bulwark of national liberty'.³⁹ He pointed out that the members of the jury were not known until the day of trial and they were therefore 'inaccessible to influence or intrigue'.⁴⁰ He explained that jury duty was 'equally cast upon every qualified person in every district of the colony' and stated that the sheriff had no choice in the selection of the jurors.⁴¹ He explained that the sheriff had to summon a sufficient number of persons, whose names he was bound to take alternatively from the top and bottom of his list which contained the names of all qualified persons within the district. A jury would then be drawn by lot from the persons who had been summoned. The prosecutor and the accused could each set aside three jurors without assigning any reason for their objection, and as many respecting whom either party could show cause for objection.⁴²

39. The Colonist, 20 May 1828.

40. loc.cit.

41. loc.cit.

42. loc.cit.

Burton continued on the circuit, which turned out to be a great success, and the inhabitants of Grahamstown and other circuit towns 'testified their joy at witnessing the establishment and use of juries amongst them by illuminating their houses'.⁴³ On 24 May 1828 he received an address from the Dutch inhabitants of Albany who expressed great pleasure in witnessing British forms of justice. They were deeply gratified with the establishment of juries, 'by which they saw that no man could be punished for an offence before he was found guilty by the unanimous voice of a body of his countrymen'.⁴⁴ He arrived at Graaff-Reinet on 26 May and was met by the officials and a large party of horsemen who greeted him with cheers and a general discharge of their firearms;⁴⁵

'The streets were lined with spectators, and when his lordship alighted at the residence prepared for him, the cheering and firing was repeated and kept up with much spirit for sometime, the day being most agreeably concluded with a handsome entertainment.'

On the morning of Burton's departure, W.C. van Ryneveld, the civil commissioner, delivered an address to the judge, during which he stated the following;⁴⁶

'All your examinations of witnesses, charges and addresses to the jury were sufficiently understood by us, and that the ends of justice were fully answered by it.'

Van Ryneveld concluded by expressing the hope that Burton would use his influence to prevent the exclusion of

43. loc.cit.

44. The Colonist, 1 July 1828.

45. The Colonist, 26 July 1828.

46. loc.cit.

persons not acquainted with the English language from the list of jurors. Burton expressed his appreciation for the personal remarks which were directed towards him and the ceremony was concluded. A general salute of artillery was fired, and after breakfasting with van Ryneveld, he was conducted out of town in the same manner in which he had arrived.⁴⁷

The midland circuit was uneventful and Judge Kekewich returned to Cape Town, 'gratified by the sanity of the verdicts at George and Swellendam.'⁴⁸ However the western circuit was marred by an incident which occurred at Worcester. In the trial of Jan de Villiers, who had been charged with the murder of a slave, Judge Menzies rejected a number of persons who had been summoned as jurors, on the ground that they were not sufficiently proficient in the English language. He was only prepared to empanel five jurors and as this fell short of the number required to constitute a jury, he ordered that the case be removed to Cape Town for trial. At Clanwilliam he encountered no criminal business and he proceeded to Stellenbosch where he opened the circuit court on 27 May 1828. He concluded the circuit the following day, after having disposed of five criminal and two civil cases.⁴⁹ Fortunately the jurors were all proficient in the English and Menzies expressed his entire satisfaction

47. loc.cit.

48. Hattersley, loc.cit., p.124.

49. The Colonist, 3 June 1828.

with 'the wisdom and intelligence manifested by them during the different trials'.⁵⁰ In the evening the whole town was illuminated 'as a testimonial of the joy of the inhabitants at witnessing the establishment of juries amongst them'.⁵¹

3.6. THE CHIEF JUSTICE AND THE COUNCIL OF ADVICE

The first serious clash involving the judicial and the legislative authorities arose as a result of Sir John Wylde's membership on the Council of Advice. Although the Charter had provided for an independent judicial authority, it had left open the question of the Chief Justice's membership on the council. The Council of Advice had been formed on 4 May 1825 in order to curb the Governor's autocratic powers.⁵² The council, which served as the legislative authority at the Cape, was presided over by the Governor and consisted of the six principal government officials. As one of the principal officials, Sir John Wylde was accorded a seat on the council, and at the outset he was placed in an awkward position. When he appeared in the council chamber on 2 January 1828 in order to take the oaths of office, he objected to taking the oath of secrecy on the grounds that it would preclude him from discussing proposed legislation with the judges. He obtained permission to argue his objections before the council at a later date, and on this occasion he offered to take a modified

50. loc.cit.

51. loc.cit.

52. Ralph Kilpin, The Romance of a Colonial Parliament, London : Longmans Green, 1930, p.38.

oath. The councillors, however, refused to accept the modified oath, 'and so, willy-nilly, he took the oath and revenged himself by filling in twenty-seven pages of the council's minute book with his remonstrances'.⁵³ Some time later he again came into conflict with the councillors when he objected to certain measures which had been considered in his absence. He filled another ten pages of the minute book, during which he 'roundly condemned the clerk of the council for daring to question the right of the Chief Justice to record any opinion, reproved the Governor for backing up the clerk, and fulminated against the council as a whole for backing up the Governor'.⁵⁴

The Governor took the matter up with the Colonial Office, and in July 1828 the Under-Secretary for Colonies responded in a private and confidential letter.⁵⁵ He directed that the Chief Justice should only be called into the council chamber to deal with matters strictly relating to his profession, and stated that this was 'a limitation to which it was originally intended that he should be subject'.⁵⁶ He advised the Governor that, in the event of the Chief Justice disputing his dismissal from the council, 'he was to hint to him that the same powers which were employed to appoint him Chief Justice during good behaviour might be called in to limit his function and their

53. Kilpin, *op.cit.*, p.45.

54. Kilpin, *loc.cit.*

55. G.H. 1/69. Letter dated 19 July 1828.

56. *loc.cit.*

duration'.⁵⁷ The Governor was also instructed to inform the Chief Justice that the Charter of Justice was an experiment and that it had to be remodelled with reference to the results of the experiment.⁵⁸ The Under-Secretary left no doubt as to how he viewed Sir John Wylde's conduct when he stated the following;⁵⁹

'It is impossible for one to have shown more gross ignorance than Sir John Wylde has done of some points upon which he ought to have been better informed, as well as of his own situation as the head of law in the colony, and I cannot but feel extreme regret and disappointment that he is, to all appearance, so little calculated to execute judiciously the important duties which are assigned him. I am not without hope that a timely reproof will bring the Chief Justice to reason and that you will be able, by judicious management, to keep him within the proper bounds of his station and remain on good terms with him.'

The dispute was formally settled by the Secretary for Colonies who used diplomatic language to inform the Chief Justice that he had been dismissed as a member of the council. In a letter dated 12 July 1828, which the Governor was instructed to show to Sir John Wylde, the following appeared;⁶⁰

'It has been determined, some time before...to dispense with the regular attendance of the Chief Justice at the council; and I have accordingly to advise you that you will acquaint him that His Majesty is graciously pleased to dispense with his service as a councillor of the government. You

57. loc.cit.

58. loc.cit.

59. loc.cit.

60. G.H. 1/69. Letter dated 12 July 1828.

will at the same time intimate to the Chief Justice that he, in common with the puisne judges, will be liable to attend at the council board, whenever they shall receive a summons from you to the effect, for the purpose of assisting you with their opinions on questions of law.'

In November 1828 the Governor informed the Secretary for Colonies that the Chief Justice had been formally notified of the decision, and he requested clarification as to the status of the judges when they were summoned to the council chamber in order to give their opinions on questions of law. The Secretary for Colonies advised the Governor that;⁶¹

'The judges are not invested with the character of legislators. They are not members of the council of government and consequently they cannot deliberate with that body. They are merely liable to be summoned by the council of government to give their opinions in point of law on such questions as may be put to them.'

He advised the Governor to adopt the procedure in use in the House of Lords. He suggested that the Chief Justice be assigned a seat on the Governor's right hand side and stated that the puisnes could be placed on the left. However he directed that the judges were not to be admitted to the council table. He concluded by stating that the Governor was at liberty to make any other arrangements for meeting the wishes of the judges, 'without deviating from the independence of the council'.⁶²

Although the legislature was made independent of judicial

61. G.H. 1/73. Letter dated 25 February 1829

62. loc.cit.

interference, it remained to be seen whether the two institutions were capable of working together as equal partners, or whether the legislature would attempt to assert its supremacy over the judiciary.

3.7. COURT STAFF AND THE QUESTION OF PATRONAGE

The second clash between the judiciary and the Governor arose out of the Chief Justice's right to appoint the minor officers of the court. The Charter of Justice had placed the patronage in the hands of the Chief Justice.⁶³ The appointments, however, were subject to the Governor's approbation,⁶⁴ which in effect restricted the patronage to that of nomination. This became apparent at the outset when the Chief Justice drew up a list of the court staff whom he wished to appoint and presented it to the Governor for approval. In addition to the judges' clerks, interpreter, tipstaff, ushers and messengers, the Chief Justice had provided for the appointment of a deputy-registrar and a chief clerk who was to be attached to the master's office.⁶⁵ The Governor refused to approve the appointment of the deputy-registrar and the chief clerk, notwithstanding the judges' opinion that the Chief Justice's patronage extended over the staff in both the registrar's and the master's offices. The Governor proceeded to appoint his own nominee to the master's office. However he decided to meet the Chief Justice half way and offered to appoint his nephew, who had been nominated

63. Section 17.

64. Loc.cit.

65. C.O. 4892. List dated 29 December 1827.

as deputy-registrar, to a clerical situation in the registrar's office. He also agreed to nominate Judge Burton's brother, Clerke Burton, as the acting master. The Secretary for Colonies approved the arrangements, but he informed the Governor that the judges 'must not imagine that their friends or relations would be considered the most proper persons for employment in the colony.'⁶⁶ He directed that the selection of the 'petty officers' of the court was to be left to the Chief Justice, but confirmed that the appointments would be subject to the Governor's approval and to his right to assign to them 'such salaries as he considered adequate'.⁶⁷ However he considered the dismissal of Mr. Murphy, the former interpreter to the Court of Justice, to be very harsh and directed that he should be immediately reinstated as the Supreme Court interpreter in the place of the Chief Justice's nominee, Mr. Swaving.⁶⁸ The directive was strenuously opposed by the judges who were of the opinion that the 'petty officers' could only be removed by the Chief Justice. The Governor was placed in a quandary as he had already dismissed Mr. Swaving. He accordingly requested a ruling from the Secretary for Colonies. In December 1829 the Secretary for Colonies informed the Governor that;⁶⁸

'The real question for consideration is whether the Chief Justice had the right of appointing Mr. Swaving, and upon that point the Charter admits no dispute. Mr. Swaving must be reinstated in his office as interpreter to the court.'

66. G.H. 1/67. Letter dated 21 April 1828.

67. Loc.cit.

68. G.H. 1/76. Letter dated 29 December 1829

Mr. Swaving was accordingly reinstated but it was apparent that the question of patronage had not been satisfactorily settled. The issue was only finally settled in 1834 when the Second Charter of Justice removed the patronage from the Chief Justice and placed it entirely in the hands of the Governor.⁶⁹

3.8. REPORT ON THE JUDICIAL ESTABLISHMENT

In May 1828 the Governor submitted a report on the judicial establishment to the Secretary for Colonies. He stated that the Supreme and circuit courts had been successfully introduced and that trial by jury had succeeded beyond all expectations.⁷⁰ He praised Judge Burton highly and stated that he knew of no person so signal to the task, 'as none appears to have taken more pains to make himself thoroughly acquainted with the existing laws'.⁷¹ He reported that the Attorney-General had been appointed public prosecutor for the colony in conformity with the instructions of 5 August 1827. He explained that the Attorney-General personally conducted all the prosecutions in the Supreme Court, and he was assisted by the clerks of the peace⁷² who conducted the circuit court prosecutions on his behalf. He stated that although the office of public prosecutor had been based on the Scottish model, certain deviations had been introduced, on the advice of the council, 'where the ancient practice of the colony was more in conformity with the English Law and where the necessity

69. Section 15 of the Second Charter of Justice.

70. G.H. 23/8. Report dated May 1828.

71. loc.cit.

72. loc.cit.

was made out for imposing a harsher rule'.⁷³ He expressed doubt as to whether the Scottish model was suited to the local circumstances which required the Attorney-General to maintain a correspondence through the arrival of a weekly post from the outlying districts.⁷⁴ He pointed out that some of the principal and most populous districts were five hundred miles from Cape Town, and that preliminary examinations of crimes which were committed in these districts took considerable time to arrive there.

The Attorney-General had to decide on the propriety of indicting the accused and he then had to forward the indictment and instructions for the prosecution, during which time the accused, if apprehended, had to remain in custody. In order to overcome the difficulty in communication it had been deemed necessary to allow the circuit court prosecutor to hold the trial over to the next circuit if the accused had not been indicted thirty days before the opening of the court.⁷⁵ This had the unfortunate effect that unless the accused was released on bail, he would have to remain in custody for six months before being tried.⁷⁶ However the Governor explained that travelling was difficult, harmful and dangerous, and he felt that it would cause greater hardship to bring the accused, complainant and witnesses to Cape Town for trial before the Supreme Court.⁷⁷

The Secretary for Colonies commented on the report in

73. loc.cit.

74. loc.cit.

75. loc.cit.

76. The unsatisfactory state of affairs was later siezed upon by the protagonists of a decentralized Supreme Court and was only satisfactorily resolved when the Eastern Districts Court was established in 1864.

77. G.H. 23/8, loc.cit.

December 1828. He criticized the criminal procedure Ordinance⁷⁸ and stated that it contained various regulations which could have been more properly established by the judges.⁷⁹ However the King had been advised not to disallow the Ordinance on that account, 'lest such measure should excite any jealous or unfriendly feelings between the legislative and the judicial bodies of the colony'.⁸⁰ He warned of the extreme inconvenience which would arise if the distinctions which the Charter had established between the duties of the legislature and the judiciary were confounded. He accordingly directed that the criminal procedure Ordinance was not to be used as a precedent for any similar regulations in the future.⁸¹ He criticized the rules of court and stated that there were some rules of questionable utility and some which were framed with inaccuracy of style.⁸² However he had no serious objections to the rules and stated that 'experience would disclose to the judges the defects of their regulations and suggest further improvements to them'.⁸³ He drew attention to the Charter and stated that it was 'experimental' and that it would probably call for revision in the near future.⁸⁴ He concluded the dispatch in a more positive vein by conveying the King's 'very gracious approbation of the great industry and sound judgment by which the judges' labours had been sustained'.⁸⁵

78. Ordinance No. 40.

79. G.H. 1/71. Letter dated 28 December 1828.

80. loc.cit.

81. He was apparently unaware of the fact that Menzies and Burton had drafted the ordinance.

82. G.H. 1/71, loc.cit.

83. loc.cit.

84. loc.cit.

85. loc.cit.

3.9. THE EXCLUSION OF NON-ENGLISH SPEAKING PERSONS FROM THE JURY LISTS

The third dispute between the legislature and the judiciary arose out of the legislature's authority to determine the qualifications of the jurors. The Charter of Justice had placed the authority in the hands of the legislature⁸⁶ and an Ordinance laying down the qualifications for both grand and petit jurors was promulgated on 4 February 1828.⁸⁷ The legislators had no intention to exclude non-English speakers from the jury lists and nowhere in the Ordinance was reference made to such a requirement. However the Chief Justice and Judge Menzies decided, as a rule of practice, to insist that the jurors had to have a sufficient understanding of the English language to enable them to follow the proceedings without the aid of an interpreter.⁸⁸ The decision had been taken in Judge Burton's absence and had been opposed by Judge Kekewich. However an opportunity soon arose, during the second criminal session of the Supreme Court, for the full Bench to consider the question.

When the case of Jan de Villiers⁸⁹ was called on 3 July 1828 it was found that one of the jurors could not understand the proceedings without the aid of the interpreter.⁹⁰ The court ordered that the juror be set aside, but counsel for the accused objected and moved that the order of court and his objection be recorded. The objection was

86. Section 48.

87. Ordinance No. 41.

88. See 3.4.

89. Judge Menzies had removed the trial from Worcester owing to the absence of a sufficient number of English speaking jurors.

90. For a detailed account of the proceedings, see The Colonist, 8 July 1828.

then argued by counsel, and the judges delivered their reasons for either overruling or upholding the objection. The Chief Justice commenced by explaining that;⁹¹

'The court had been extremely desirous that the question should be brought forward in such a shape as to allow...appeal from the former judgment, or if the Bench could come to no positive decision, that an appeal might be made, where alone, under the Charter, relief was to be found.'

He stated that the issue was one of law and that the judges had no discretion in the matter. He pointed out that no definition of trial by jury had been given in the Charter and that it was therefore necessary to look to the English statutes, which he held to be binding on the court. After analysing the English law, he came to the conclusion that an understanding of the English language was required of jurors. Menzies concurred with the Chief Justice and explained that when the question had first been raised, the judges had been obliged to give a ruling without the assistance of the Bar. However he stated that if anything that he had heard, or which he should still hear, should convince him, he would not hesitate to declare that he had changed his opinion. He then made the following comment which sheds some light on to his attitude towards the decisions of the colonial courts in Ceylon and India;⁹²

'If the Charters and the laws were the same as here and the decision of the judges different, he must consider the judgment of the courts erroneous and that they could not guide this court.'

91. The Colonist, loc.cit.

92. loc.cit.

Judge Burton agreed that the question was one of law but stated that the Charter had intended trial by jury to be universal. He pointed out that it was not intended that the judges should be sent on circuit at great expense in order that they might send cases to the Supreme Court. He pointed out that he had tried nearly three hundred cases, and stated that 'in no one of which both parties understood English'.⁹³ He therefore could not agree that a knowledge of the English language was required of jurors. Judge Kekewich agreed with Burton and stated that a knowledge of the English language could not be supposed to have any reference to the qualifications of a juror, except by a 'wire drawn inference or contorted conclusion'.⁹⁴ He pointed out that as the Bench was divided, he would follow the practice at Westminster and give no judicial voice so that a decision might be had. The Chief Justice then summed up by stating that;⁹⁵

'The court was desirous to give the prisoner every opportunity of speaking...and would therefore grant a certified copy of the proceedings when applied for. It was not for the court to decide whether such a judgment was a matter for appeal. The Privy Council would determine the issue.'

In August 1828 the Governor reported the matter to the Secretary for Colonies.⁹⁶ He explained that when the case had come before Judge Menzies at Worcester, neither the prosecutor nor the accused had objected to the juror whom the judge had set aside, and that both parties were prepared to go to trial with a sixth juror speaking Dutch

93. loc.cit.

94. loc.cit.

95. loc.cit.

96. G.H. 23/8. Letter dated 11 August 1828.

only, but the judge had insisted on removing the hearing to Cape Town. He questioned the judge's authority to remove the trial out of the district and pointed out that the English practice provided for the trial to be put off to the next session where there was a deficiency of jurors. He did not feel that there was a deficiency as, in his opinion, the Dutch speaking juror was duly qualified. He drew attention to the extreme hardship to which an accused might be exposed if the judges were permitted to remove trials to Cape Town at their discretion, and stated that;⁹⁷

'In framing the Royal Charter it could never have been meant to deviate so widely from the Law of England as to allow a judge of a circuit court, at his mere discretion, to send an accused person to be tried for his life at a place perhaps six hundred miles distant from that in which he had made preparations for his defence.'

He explained that there were several districts in the colony where it might be impossible to hold criminal trials if the jurors were required to be conversant with the English language. He pointed out that Burton and Kekewich had found no difficulty in conducting trials with jurors who did not understand the English language. Moreover the Ordinance which had established the qualifications for jury service had made no mention of the English language, as the councillors were fully aware of the difficulty which such a requirement would have raised in many of the country districts. He concluded by requesting an opinion from the law officers.

97. loc.cit.

The Secretary for Colonies directed the Governor to obtain a report from the judges as he wanted to know whether their decision was based on an ambiguity in the language of the Ordinance or upon their construction of the Charter. He pointed out that the Charter had delegated the power of determining the juror's qualifications to the Governor and the Council of Advice, and stated that he found it very difficult to understand the grounds for the judges' decision. He explained that, if the decision was based on the Charter, it would have to be amended in order to dispel all uncertainty on a subject of such great importance, and stated that;⁹⁸

'It seems sufficiently obvious that the principle adopted by the court is at least impolitic. It draws an invidious distinction between the different classes of His Majesty's subjects.'

In February 1829 the Secretary for Colonies informed the Governor that he had learnt with regret that the judges had based their decision on the Charter of Justice, and stated that;⁹⁹

'No means are left for accomplishing this change in the law but by an alteration in the Charter, a measure which I should not adopt without great reluctance, but which must nevertheless be adopted if the judges persist in excluding the Dutch inhabitants of the colony from acting as jurors in their native land. Whatever view the judges may take of the legal effect of the Charter in this respect, it is at least clear that their construction is totally at variance with the real intention of His Majesty's government in framing that instrument.'

98. G.H. 1/71. Letter dated 27 December 1828.

99. G.H. 1/72. Letter dated 22 February 1829.

He pointed out that the judges had the right to remove cases from one part of the colony to another. However he stated that they had been entrusted with this authority in the expectation that it would be used with 'moderation and wisdom' and as the means of preventing the 'very mischief which is said to have arisen'.¹⁰⁰ He concluded by stating that if it transpired that the judges had abused or had made an improper use of their authority, steps would be taken for 'narrowing the extent of that trust'.¹⁰¹

In the meantime, the two junior puisne judges did not consider themselves to be bound by the de Villiers decision. The Bench remained divided on the issue until 1834, when the Second Charter of Justice expressly provided that no person was incompetent to serve on a jury by reason of his ignorance or supposed ignorance of the English language.¹⁰²

3.10. THE GOVERNOR VERSUS THE JUDICIARY

The dispute between the Governor and the judges had its origin in the trial and conviction of a Bushman who had been sentenced to death by the Court of Justice for a murder which had been committed beyond the colonial boundary.¹⁰³ The Governor questioned the validity of the conviction and he referred the matter to the judges for an opinion. They advised that the Court of Justice had exceeded its jurisdiction and they also drew attention to the fact that the

100. loc.cit.

101. loc.cit.

102. Section 34.

103. G.H. 23/9. Letter dated 15 August 1829.

Supreme Court was only authorised to take cognizance of offences which were committed within the colonial boundaries. The Governor then sought the advice of the former Chief Justice, Sir John Truter, and the Attorney-General. They disagreed with the opinion expressed by the judges. He then decided to settle the impasse by preparing an Ordinance which purported to give the court extra-territorial jurisdiction, because he believed that 'murder and other atrocities were frequently committed with impunity by those who passed the boundary of the colony in pursuit of stolen cattle', and he did not want the offenders to escape the confined jurisdiction of the court.¹⁰⁴ However the Chief Justice advised that the Ordinance was inconsistent with the fundamental laws of the colony. Furthermore he had the backing of the puisne judges, who expressed the opinion that a communication through the Secretary for Colonies was not sufficient to authorize the measure. The exasperated Governor requested the Secretary for Colonies to prepare an Act in England, 'the legality of which could not be called into question by the Court'.¹⁰⁵ At the same time he requested a ruling as to whether he had the authority to issue legislative proclamations without consulting the Council of Advice. He had sought the judges' opinion on this matter and they had advised that he could not competently issue any legislative enactment without the intervention of the council. They had advised that, provided he acted in council, he could disregard the councillors' advice and the court would be bound to recog-

104. loc.cit.

105. G.H. 23/9. Letter dated 1 June 1831.

nise the enactments as laws, if they were issued in the form of an Ordinance. The councillors, however, took exception to the opinion because they felt that it would be unjust to publish an Ordinance, as sanctioned by them, when it had been opposed by the majority of them. Furthermore, they held the view that the Governor had the authority to issue any proclamation in his own name and without reference to the council. The Governor concluded his letter to the Secretary for Colonies with the following statement;¹⁰⁶

'I would request your earliest attention to the subject as it is extremely advisable that a matter of such delicacy and importance should be settled at least as speedily as possible in order to prevent future collision between the executive government and the judicial authorities.'

In his reply, the Secretary for Colonies advised the Governor that as there was no appeal from the Supreme Court in criminal cases, the judges had the power to give the 'most complete practical effect to the opinion which they had repeatedly and deliberately advanced on the question of jurisdiction'.¹⁰⁷ He accordingly directed that it would be the 'most decorous as well as the most convenient course to defer to a decision which it would be impossible to reverse'.¹⁰⁸ He explained that the judges could not be charged with a clear and palpable error, and stated that;¹⁰⁹

'Although it appeared to him that they had not done full justice to the arguments by which their conclusions might be impugned, yet he should be very deficient in candour were he not to admit that they

106. loc.cit.

107. G.H. 1/87. Letter dated 3 December 1831.

108. loc.cit.

109. loc.cit.

had adduced in support of those conclusions many considerations of great force and value.'

He advised the Governor that the opinion of the judges, with regard to the validity of legislative proclamations which were promulgated without consulting the council, was 'strictly correct and unexceptionable'.¹¹⁰ However he felt that some modification was required with regard to the instruction which required the Chief Justice to report whether pending legislation was consistent with the fundamental laws of the colony. He accordingly directed that;¹¹¹

'The reference should be made, not to the Chief Justice alone, but to such of the judges as may not be absent on their circuits; so that when the Chief Justice shall enter on that branch of duty the reference may in his absence be made to his resident colleague or colleagues. The question to be proposed should not be expressed as at present, since nothing can be more vague than the phrase "fundamental laws". The enquiry should be whether, if a law were passed in the terms of the draft transmitted to the judges, there would be any legal impediment to its execution by the colonial tribunals; and, if so, by what means, if any, that impediment might be most conveniently surmounted.'

He pointed out that the new reference would obviate the danger of a collision between the legislature and the judiciary. However it was clear from the previous conflicts that the relationship between the executive, legislative and the judiciary was far from satisfactory. It was also apparent that the Charter of Justice was going to be amended

110. loc.cit.

111. loc.cit.

and that the Chief Justice would be required to join the puisne judges on circuit. Nonetheless it took one additional factor to finally seal the fate of the Charter.

3.11. DEVELOPMENTS PRECEDING THE INTRODUCTION OF THE SECOND CHARTER

In May 1831 the Secretary for Colonies informed the Governor that it had been decided to make the colony self-supporting financially.¹¹² He explained that it would therefore be necessary to reorganize the government departments, dismiss redundant personnel and reduce the salaries of some of the officials. He advised that the Bench was to be reduced from four to three judges and that the orphan chamber was to be merged with the master's office. He stated that it was essential that the master should be a member of the legal profession and directed that the president of the orphan chamber be appointed to the office.¹¹³ Furthermore a number of salary reductions were to be implemented, the most noteworthy being that of the Chief Justice, whose salary was to be reduced from two thousand five hundred pounds to two thousand. The Secretary for Colonies produced the following table which depicted both the existing Supreme Court establishment and the new arrangement :¹¹⁴

112. G.H. 1/82. Letter dated 27 May 1831.

113. The incumbent master, Clerke Burton, was to be retrenched together with his staff.

114. G.H. 1/82, loc.cit.

SUPREME COURT ESTABLISHMENT

<u>1831</u>		<u>NEW ARRANGEMENT</u>	
Chief Justice	2,500	Chief Justice	2,000
Clerk	200	Clerk	200
Senior Puisne	1,500	Senior Puisne	1,500
Clerk	150	Clerk	150
Second Puisne	1,500	Second Puisne	1,500
Clerk	150	Clerk	150
Third Puisne			
Clerk			
Registrar	600	Registrar	400
Clerk	200	Clerk	150
Master	800	Master	800
Chief Clerk	200	Orphan Chamber	
Second Clerk	150	Establishment	1,170
Third Clerk	75		
Interpreter	250	Interpreter	200
Tipstaff	60	Tipstaff	60
Three Ushers	150	Three Ushers	150
Messenger	50	Messenger	50
Master's Messenger	27		
	£ 10,212		£ 8,480

He informed the Governor that, before the new arrangement could be implemented, it would be necessary to alter the Charter of Justice, thereby indicating that financial considerations had finally sealed its fate.

In September 1831 the Governor informed the Secretary for Colonies that the Chief Justice had expressed the hope that he might be allowed to retain the patronage over the officers of the Supreme Court.¹¹⁵ The Chief Justice had also stated that his exemption from circuit duty had been

115. G.H. 23/9. Letter dated 24 September 1831.

held out as a bonus on his coming to the colony. However the Governor felt that the extent of the patronage belonging to the Chief Justice should be clearly defined, more particularly as the office of the orphan chamber and the master were to be consolidated. He pointed out that the newly constituted office had to be filled with competent persons and stated that this was more likely to be effected if the patronage was vested in the government rather than in the court. He recommended that the puisne judges should retain the right to appoint their own clerks and disputed the Chief Justice's contention that the right fell within the ambit of his patronage.

He drew attention to the necessity for making provision for the extension of the jurisdiction of the Supreme Court beyond the colonial boundaries. He also felt that the difference of opinion which existed between the judges, as to whether jurors were required to understand English, should be settled. He pointed out that the practice of the circuit courts was occasionally different from that of the Supreme Court when it came to admitting non-English speaking persons to preside as jurors, and stated that;¹¹⁶

'This discrepancy is not only productive of evil as regards the question itself, but it also serves in some measure to sever the connection which ought at all times to exist between the two courts, and the consequence of which might in some future occasion be productive of inconvenience in the administration of justice.'

116. loc.cit.

In October 1831 he informed the Secretary for Colonies that the judges had expressed their regret at the prospect of being deprived of Mr. Burton's services as master of the Supreme Court.¹¹⁷ The judges were of the opinion that Burton was the most competent person in the colony to fulfil the duties which were to devolve upon the head of the newly constituted establishment. The Governor felt that the judges were best qualified to decide on the issue and stated that Burton had been 'equally fortunate in obtaining the good opinion of the public'.¹¹⁸ He concluded by recommending that Burton should be retained as master.

In December 1831 the Secretary for Colonies replied to the issues which had been raised by the Governor and the Chief Justice.¹¹⁹ He agreed with the Governor that the contradictory practice of the judges, respecting the admission and exclusion of jurors ignorant of the English language, was 'highly unseemly and inconvenient' and stated that the matter would be settled in the new Charter of Justice which was being prepared.¹²⁰ He advised that the new Charter would transfer the patronage over all the officers of the court to the Governor. He refused to admit that the Chief Justice had any claim to exemption from the duty to perform circuits and stated that he was authorized to remain at Cape Town.¹²¹

'Not certainly as a personal indulgence to himself, but because in the infancy of the present system it was supposed that the present arrangement would be most conducive to the public interest.'

117. G.H. 23/9. Letter dated October 1831.

118. loc.cit.

119. G.H. 1/87. Letter dated 3 December 1831.

120. loc.cit.

121. loc.cit.

He stated that every man who was engaged in the public service had to make 'sacrifices of personal ease and comfort', and somewhat sarcastically concluded that Sir John Wylde would 'cheerfully submit to this unavoidable obligation'.¹²² He referred to the proposed reduction in the Chief Justice's salary and pointed out the measure was necessary as it was difficult to find the means for sustaining the judicial establishment, 'without positive injustice to the colonists at large'.¹²³

3.12. THE SECOND CHARTER OF JUSTICE

In March 1832 the Secretary for Colonies informed the Governor that the new Charter would be ready before the end of April.¹²⁴ He directed the Governor to inform Judge Burton that he had been appointed to the Bench in New South Wales and that he could make arrangements to proceed there when the Charter reached the Cape.¹²⁵ In June 1832 the Secretary for Colonies drew attention to the changes which had been implemented in the Second Charter of Justice.¹²⁶ He explained that, when the Supreme Court had been established, the arrears in the judicial business and the delay and uncertainty in the administration of the laws had formed the subject of 'loud and continued remonstrance'.¹²⁷ However due to the efficiency of the court, 'all the arrears had been disposed of', and the judges had been left without sufficient work.¹²⁸ He praised the zeal with which the judges had carried out their tasks and stated that

122. loc.cit.

123. loc.cit.

124. G.H. 1/90. Letter dated 29 March 1832.

125. Burton left the colony on 14 October 1832.

126. G.H. 1/91. Letter dated 16 June 1832.

127. loc.cit.

128. loc.cit.

when he had advised the King to remove one of the judges he had 'yielded with reluctance to the indispensable necessity of economising the public resources'.¹²⁹ He had selected Judge Burton because he was the judge who could vacate his office with the least public inconvenience, and he stated that;¹³⁰

'Mr Burton's labours have been eminently useful. He has taken an ample share in the fatigues of the circuit and the deliberations of the court, and has contributed largely to that code of judicial proceedings which the judges have promulgated with so much advantage to the colony and so much well earned credit to their own industry, discernment and research.'

Under the circumstances, he had deferred Burton's removal until he could prefer him to another judicial office of equal dignity and emolument.

He stated that the Chief Justice would have to take a share of the circuits and he denied that either the patronage or the exemption from circuit courts were held out to him as a 'bonus'. He dealt with the question of patronage and explained that;¹³⁰

'The distribution of such patronage is a trust and in that light only did I regard it. The selection of the Chief Justice to execute that trust was made under the influence of the opinion that, in his hands, this power would be less liable to abuse, and would be exercised with less danger of collisions between the executive and judicial authorities than if committed to the Governor. I have since found reason to correct that opinion, nor can I regard myself as precluded by Sir John Wylde's personal interests from adopting any improvement in the construction of the Charter which further experience has suggested.'

129. loc.cit.

130. loc.cit.

131. Section 15.

He pointed out that the Charter had transferred the patronage to the Governor.¹³¹ However he directed that the judges were to retain the right to appoint their own clerks because of the confidential nature of the relationship which existed between them.

He drew attention to the provision which had relaxed the qualifications which were required for appointment to the Bench,¹³² and explained that this had been deemed necessary because eminently qualified persons might not possess the qualifications which had been laid down in the First Charter of Justice. He explained that the special regulations which had provided for the payment of the judge's salaries had been excluded from the Second Charter because there was no sufficient reason why the general rules should not apply to the judges. He drew attention to the necessity for reducing the quorum of the court from three to two judges and explained that, where a difference of opinion arose between two of the judges, the judgment would be suspended pending a meeting of the full Bench.¹³³ He pointed out that, the Charter authorized the Governor to suspend the judges for misconduct on the advice of the Executive Council,¹³⁴ and explained that the amendment was necessary because the Charter was a permanent Act which had to be adapted to meet the new system of government which was to be introduced in the near future.¹³⁵ He referred to the enlargement of the right of appeal to the Privy Council, which now provided for an appeal where the amount in dispute amounted to five hundred pounds,¹³⁶ and explained that

131. Section 15.

132. Section 3 provided that candidates were no longer required to have been in practice for three years, and future appointments could be made from the practitioners at the Cape Bar.

133. Section 33.

134. Under the First Charter the Governor had to act on the advice of the council of government.

135. The new system provided for both an Executive and legislative Council.

136. Section 50.

this was a consequence of the reduction in the number of judges, 'which to a certain extent diminished the security of the public at large for an accurate administration of the law'.¹³⁷ He referred to the provision which had removed all doubt as to whether ignorance of the English language precluded persons from serving as jurors, and he pointed out that it would no longer be an obstacle.¹³⁸ He concluded by informing the Governor that he had decided to retain Mr Burton's services as master of the Supreme Court.

3.13. IMPLEMENTATION OF THE CHARTER

Although the Charter had reached the Cape in 1832 the Governor was unable to implement it until 13 February 1834. The reason for the delay was partly due to the fact that the Charter had made reference to a Legislative Council which had not yet been formed. In terms of the Charter, the judges were required to apply the laws which were enacted by the Governor with the advice of the Legislative Council.¹³⁹ The judges, with the exception of Menzies, were not prepared to recognise that the existing council could be construed so as to fall within the meaning of the proposed Legislative Council. The Governor informed the Secretary for Colonies that, if he brought the Charter into operation, he would be obliged to refrain from issuing any legislative enactments on the advice of the existing council, because he would then be forced into a collision with the judges.¹⁴⁰ He had therefore not hesitated in being guided by the opinion of the majority of the

137. G.H. 1/91, loc.cit.

138. Section 34.

139. Section 31.

140. G.H. 23/10. Letter dated 8 February 1833.

judges which was supported by the Attorney-General.

He pointed out that the business of the orphan chamber was in arrears and stated that the implementation of the Charter would place the master under every possible disadvantage.¹⁴¹ He explained that he had instructed the Auditor-General and the master to examine the state of affairs of the orphan chamber soon after he had received the Charter, so as to enable the government to take measures to protect its interests before the chamber was dissolved, and to enable the master to become 'intimately acquainted with any amended regulation that might be required beforehand'.¹⁴²

The Second Charter of Justice was eventually promulgated on 13 February 1834. This was possible because a Legislative Council had been established soon after the arrival of the necessary letters patent which had accompanied the new Governor, Sir Benjamin D'Urban. The Governor informed the Secretary for Colonies that, on the advice of the judges, he had simultaneously promulgated three Ordinances which had abolished the orphan chamber and had provided for the administration of estates under the new arrangement.¹⁴³

3.14. EARLY STAGES IN THE DEVELOPMENT OF JUDICIAL PRECEDENT

The Charter's of Justice had laid the foundation for the

141. loc.cit.

142. loc.cit.

143. No. 103, 104 and 105.

development of a system of judicial precedent. The Supreme and circuit courts had been declared courts of record and the registrar had been appointed 'keeper of the records', thereby securing the material from which precedent could be developed.¹⁴⁴ At the outset, the judges had adopted the practice of delivering the reasons for their judgments in open court and the press was free to report the proceedings. In August 1828 the *Colonist* carried an extract from an essay on the Laws of the Cape of Good Hope,¹⁴⁵ wherein the subject of law reporting was singled out for attention.¹⁴⁶ The author had stressed the importance attached to the public delivery of the judgments of the courts which were supported by reasons. He advised the newspaper editors to be impartial in reporting cases and called for 'skilful and honest reporting.' He also made a plea for the appointment of a public shorthand writer to the Supreme Court.

The hierarchy of the Cape courts also provided limited scope for the development of a system of judicial precedent. The proceedings of the inferior courts were subject to review by the judges who could correct or set them aside.¹⁴⁷ A right of appeal from the civil judgments of the circuit courts, to the full Bench of the Supreme Court, was available in cases where the amount in dispute exceeded one hundred pounds.¹⁴⁸ Furthermore a right of appeal from the civil judgments of the Supreme Court, to the Privy Council, was available in civil cases where the amount in dispute exceeded one thousand pounds.¹⁴⁹ The right of appeal to

144. Sections 2,40 and 16 of the First Charter; Sections 2,39 and 15 of the Second Charter.

145. Saxe Bannister, *An Essay on the Laws of the Cape of Good Hope with references to the Laws of England*, Cape Town : W.Bridekirk, 1827.

146. *The Colonist*, 2 September 1828

147. Section 34 of the First Charter; Section 32 of the Second Charter.

148. Section 42 of the First Charter; Section 43 of the Second Charter.

149. Section 51.

the Privy Council was subsequently extended by the Second Charter which reduced the amount which was appealable to five hundred pounds.¹⁵⁰

In 1833 an important development took place in England which was significant to the growth of judicial precedent at the Cape. On 14 August 1833 an Act was passed for the better administration of justice in the Privy Council.¹⁵¹ The Act set up a Judicial Committee of the Privy Council, consisting of the President of the Council, the Lord Chancellor, any member of the Privy Council holding one of a large number of mainly judicial offices and Privy Councilors who had held any of the specified offices.¹⁵² The Sovereign was empowered to appoint two other Privy Councilors to be members and to require the attendance of other judges if they were also members of the council.¹⁵³ Prior to the passing of the Act, the members of the Committee of the Privy Council, which heard appeals, were not required to possess any judicial qualifications. With the creation of a Judicial Committee composed of eminent lawyers, it was to be expected that the decisions of the council would take on a greater significance in the development of judicial precedent at the Cape.

Another factor, which influenced the development of judicial precedent, was the training of the judiciary. With the exception of Menzies, the judges had been schooled in the tradition of English Law, and all of them were well

150. Section 50.

151. 3 & 4 W. 4, c.41.

152. Section 1.

153. loc.cit.

acquainted with law reports which formed the major tools of their craft. Hence Sir John Wylde's comment at the first sitting of the Supreme Court, that the judges would make use of the previous decisions of the Court of Justice.¹⁵⁴ Furthermore the Charter had cemented the English Law tradition by restricting future entry to the Bar to persons possessing English, Irish or Scottish qualifications. There is also evidence which suggests that the local advocates had been influenced by the English Law. In their report on the administration of justice at the Cape, the Commissioners had referred to diffuse quotations from the English Law which were to be found in the pleadings and memorials of the Court of Appeal.¹⁵⁵

An analysis of the Supreme Court records reveals that counsel began to rely on the precedents of the Court of Justice at the outset,¹⁵⁶ and it was not long before they began to cite the decisions of the court itself.¹⁵⁷ The judges adopted a cautious approach when considering the previous decisions of the court,¹⁵⁸ and they soon began to expressly rely on them to justify their judgments.¹⁵⁹ It is clear, however, that the individual judges did not initially consider themselves to be bound by decisions of the full Bench.¹⁶⁰

It must be pointed out that during this period the rules of precedent were still fairly fluid in England.¹⁶¹ Furthermore the absence of published law reports greatly

154. The Colonist, 3 January 1828.

155. See 1.7.2.1.

156. Witham v. Venables (1828) 1 Menz.291; Brand v. Mulder (1829) 1 Menz. 25

157. Brand v. Mulder, loc.cit., Watermeyer q.q. v. Theron and Meyring (1833) 2 Menz. 14 (18).

158. Meyer v. Low (1832) 2 Menz. 8 (12).

159. Malan v. Ziedman, 29 June 1829; In re Taute (1830) 1 Menz.497.

160. Rex v. de Villiers, see 3.9.

161. Rupert Cross, Precedent in English Law, 3rd.edition, Oxford : Clarendon Press, 1977, p.22.

hampered the process,¹⁶² although the press gave extensive coverage to the newsworthy cases. It is perhaps apt to describe the experimental period in the history of the Cape Supreme Court as the period of silent growth in the development of judicial precedent.

3.15. CONCLUSION

The Supreme Court emerged from the experimental period with a reduced Bench, an enlarged master's office, and a Chief Justice who was somewhat diminished in status and in pocket. Judge Menzies, who had unwisely instigated the language qualification dispute, experienced the discomfort of having his judgment overruled by the Second Charter. Judge Burton, who had travelled to Holland to learn the Dutch language and to study the Roman Dutch Law, and who proved to be exceptionally hard working¹⁶³ and was well thought of, was unceremoniously shipped off to New South Wales. Judge Kekewich, who had been elevated to the Bench as a compensation for his removal from the Vice-Admiralty Court, remained very much in the background. After a somewhat hesitant start, the judges had apparently performed too well and the Bench was left to carry on without Burton. However they turned out to be 'lions under the throne' and were not prepared to brook any interference from either the Governor or the Council of Advice. It remained to be seen how they would fare against the newly constituted Legislative Council.

162. Menzies' Reports which covered the period 1828-1849 were only published in 1870.

163. Burton wrote the first legal textbook to be printed at the Cape. His Observations on the Insolvent Law was published by George Grieg in 1829.

CHAPTER FOUR

4. EXTERNAL FACTORS AND THE EMERGENCE OF A CENTRALIZED SUPREME COURT AT CAPE TOWN

4.1. INTRODUCTION

The period 1834-1846 is characterized by external rather than internal developments in the chronicle of the Cape Supreme Court. In 1836 the British Parliament passed the Cape of Good Hope Punishment Act which extended the criminal jurisdiction of the Cape courts beyond the colonial boundaries. It is therefore necessary to cross the border in order to deal with an event which has been described as 'quite extraordinary', and which led to one of the most remarkable episodes in which a judge has been involved. The next event, which concerned the Supreme Court, occurred in the Eastern districts of the colony. In 1836 the Eastern districts were placed under the administration of a Lieutenant-Governor, who questioned the rank and precedence which the judges enjoyed whilst conducting circuits in his domain. In 1842 a far more significant event occurred in Cape Town, when the Legislative Council decided to flex its muscles, and proceeded to test its relationship with the judiciary. The judges misjudged the prevailing mood and decided to resist the authority of the Council. However, their ingeniously contrived arguments came to nought and the Legislative Council was empowered to amend

the Charter of Justice, thereby subordinating the judiciary to the local legislature.

Emboldened by their newly acquired powers, and spurred on by considerations of economy, the members of the Legislative Council set up a Committee of Inquiry to investigate the judicial establishment. The Committee decided, by the Chairman's casting vote, to emasculate the Supreme Court by breaking it up into a number of decentralized local courts. However the Secretary for Colonies was not prepared to allow the measure, and he laid down a principle which was followed until 1904, when Divisional Courts were established.¹ The maintenance of a centralized Supreme Court at Cape Town, with jurisdiction throughout the colony, was thereby confirmed.

During the traumatic period, when the fate of the Supreme Court was in the balance, events were taking place in the newly annexed District of Natal, which enhanced and extended the influence of the court. In 1845 a District Court of Natal was established,² and Hendrik Cloete, a Cape advocate and member of the Legislative Council, was appointed to the Bench. A right of appeal was granted to the Cape Supreme Court in civil matters, and criminal cases could be removed to Cape Town for the determination of points of law. Although Natal was separated from the Cape Colony in 1847, the Cape Supreme Court continued to hear appeals until 1853.

1. The Better Administration of Justice Act No. 35 of 1904.
2. Ordinance No. 14 of 1845.

4.2. BEYOND THE COLONIAL BOUNDARY

In 1836 the British government extended its criminal jurisdiction over colonial subjects, who committed crimes in the territory adjacent to the Cape Colony to the Twenty-fifth Degree of South Latitude.³ The object of the Act was clearly to protect the indigenous inhabitants against 'outrages and violence from British subjects'.⁴ The Act, however, proved to be a brutum fulmen, as it failed to provide adequate machinery to enforce its provisions, and very few prosecutions were instituted under it.⁵ By October 1842 the territory adjacent to the Orange river, which was nominally under the jurisdiction of Adam Kok, was in a state of ferment.⁶ The unrest was precipitated by the arrest of two colonial subjects, who were alleged to have murdered two of Kok's followers. The accused were escorted to Colesberg for trial before the circuit court, which had jurisdiction to try the offence in terms of the 1836 Act. At this stage Judge Menzies arrived at Colesberg on circuit. He was informed of the state of unrest across the border and he was told that Commandant Johan Gotfried Mocke intended to proclaim the territory an independent republic. At the trial of the two accused, who were acquitted, Menzies addressed the audience on the state of unrest across the border. He stated that steps would be taken to prevent any 'injurious result' which might arise as a result of Mocke's intended action.⁷ On 22 October he crossed the Orange river at Alleman's Drift,

3. Cape of Good Hope Punishment Act 6 & 7 Will IV.c.57.
4. John Franklin Midgley, The Orange River Sovereignty 1848-1854, Archives Year Book for South African History, 1949 (2), p.11.
5. John Benyon, Proconsul and Paramountcy in South Africa, Pietermaritzburg : University of Natal Press, 1980, p.17.
6. A B Edwards, Alleman's Drift, 1842 : An extra-judicial sally, Codicillus, vol. 18 (2), 1977, p.29.
7. C Graham Botha, The Honourable William Menzies, 1795-1850, South African Law Journal, vol. 33, 1916, p.396.

and purporting to act under the Cape of Good Hope Punishment Act, he proclaimed the area British territory. To mark the occasion, he caused a plank to be nailed to a tree, bearing the inscription 'Baken van Koningin van England'.⁸ Two days later, Menzies met Mocke and about four hundred armed followers at the 'beacon.' He told them that he had acted to prevent 'crime, strife and bloodshed', and explained the meaning and purport of the 1836 Act.⁹ During the entire proceedings, Menzies 'behaved in a most calm though determined manner, having more the character of a bold but wary soldier than the legal precision of a judge'.¹⁰ The potentially dangerous situation was averted and the parties dispersed without incident.

Menzies later attempted to justify his action which was clearly unconstitutional. He explained to the Governor that he had not been motivated by political views, but had acted solely in order to 'prevent crime and to arrest the offenders'.¹¹ He admitted that he had no right to issue the proclamation in his name, but stated that he did not want to implicate the Governor.¹² On 3 November 1842 the Governor repudiated the proceedings,¹³ but he accepted that Menzies had acted for the preservation of peace and the repression of crime. However the Alleman's Drift incident aggravated the dispute, between the judges and the Lieutenant-Governor of the Eastern districts, over the question of rank and precedence. The Lieutenant-Governor used the incident to bolster his contention that

8. Graham Botha, loc.cit., p.397

9. Graham Botha, loc.cit.

10. J C Chase, *The Natal Papers*, Facsimile repr., Cape Town : Struik, 1968, part 2, p.263.

11. Graham Botha, loc.cit., p.397.

12. Graham Botha, loc.cit.

13. *Cape of Good Hope Government Gazette*, Proclamation dated 3 November 1842.

Judge Menzies had arrogated to himself powers which in the Eastern districts were vested in him alone.¹⁴

4.3. QUESTIONS OF RANK AND PRECEDENCE

The letters patent of 1836, which had constituted the Eastern districts into a distinct administration under a Lieutenant-Governor, had no effect on the Charter of Justice. The judges continued to enjoy rank and precedence next to the Governor; and the jurisdiction, powers and authority of the Supreme and circuit courts continued to function unimpaired throughout the colony. However the Lieutenant-Governor took exception to the fact that the judges ranked above him, and he lodged a number of complaints with the Governor, wherein he stated that they had improperly interfered with his administration. In particular, he complained about the circuit reports which Judge Menzies had compiled, and which dealt with local conditions in the Eastern districts. He also criticized the arrangements which the judges had made for their circuit transport, and objected to the judges corresponding directly with the civil commissioners. He subsequently modified the last-mentioned complaint and stated that he never questioned their right to communicate with the civil commissioners. He pointed out that he had never interfered with the routes taken by the judges, or with their convenience and accommodation, nor had he ever thought of limiting the expense of their transport

14. Basil A Le Cordeur, The Politics of Eastern Cape Separatism 1820-1851, Cape Town : OUP, 1981, p.112.

through the districts. Nonetheless he maintained that the judges had assumed, under the Charter of Justice, 'a power in all matters next to the Governor'.¹⁵

The Governor took the matter up with the Secretary for Colonies in July 1843.¹⁶ He stated that, in his opinion, the judges, legally speaking, were entitled to maintain their position of rank and precedence as specified in the Charter of Justice. He believed that both parties would waive any claims to precedence rather than seriously impede the public service. However he felt that the issue should be definitely settled, as it would detract from the influence of the Lieutenant-Governor and from the respect due to the judges, if it became public. He stated that if it was the deliberate intention of the government to preserve the rank and precedence of the judges unimpaired, he would comment no further. If, however, the question had never been specifically noticed, then he was of the opinion that the Lieutenant-Governor, being the head of the executive government in the Eastern districts, should have within his area of government, 'rank and precedence over and before the judges of the Supreme Court!'.¹⁷ Whatever the outcome, he saw little probability of the slightest degree of cordiality ever arising between the Lieutenant-Governor and the judges.

With regard to the complaint that the judges had written directly to the civil commissioners, the Governor was of

15. G.H. 23/14, vol.2. Letter dated 7 July 1843.

16. loc.cit.

17. loc.cit.

the opinion that the Lieutenant-Governor had really objected to the peremptory tone of the letters. The judges had informed him that they intended it to be so, because they had been repeatedly put to inconvenience by the neglect and disinclination which had been displayed on occasions by the civil commissioners. He felt that it would have been more advisable for the judges to have complained to the Lieutenant-Governor or to himself. Finally he pointed out that there was a wide distinction between the observations which were made by the circuit judges and an improper interference with the executive government. He explained that he had invariably requested the judges to report to him everything of importance which came under their notice.¹⁸

The question of rank and precedence was not the only issue which needed to be resolved. A far more serious dispute developed at Cape Town when the members of the Legislative Council decided to test their authority, by summoning the judges to appear before one of their committees.

4.4. THE ROBBER ISLAND COMMITTEE

In May 1842 the members of the Legislative Council appointed a Committee to inquire into the convict station on Robben Island.¹⁹ At its first meeting, the members resolved to summon the judges to give evidence before the Committee.²⁰ The Chairman was requested to send a copy of the resolution

18. Loc.cit.

19. John Bardwell Ebdon was elected Chairman.

20. The first meeting took place on 23 July 1842.

to the judges, and he was directed to inform them that;²¹

'The Committee would be happy to consult them in the mode of taking their evidence, whether by written answers to certain questions in writing, to be prepared by the Committee and communicated by the Chairman, or by viva voce testimony to be given to the Committee.'

However the judges were not prepared to comply with the resolution. They refused to recognize the Committee, and addressed their reply to the 'unofficial member of the Legislative Council'.²² They informed the indignant 'Chairman' that they would submit the resolution to the Governor, 'with such observations as seemed fit and desirable'.²³

Superficially, it appeared that the judges had over-reacted to what appeared to have been a reasonable and courteous request. In truth, they had perceived that the resolution was a smoke-screen and that the real issue had nothing to do with the convict station on Robben Island. This was confirmed by the Governor, who informed the Secretary for Colonies that it had come to his notice, that a certain Mr Sampson had refused to attend the Committee for purposes of giving evidence unless he was subpoenaed.²⁴

The members had then resolved to summon the judges to give evidence, in order to test the Committee's authority to secure the attendance of witnesses. The Governor pointed out that the resolution had been framed by the Attorney-General, so as to leave no doubt in the mind of the judges, that it was intended to assert the right on the part of the Committee to take their evidence and an obligation upon them to give it.²⁵

21. G.H. 28/20. Enclosure to dispatches, p.583.

22. loc.cit., p.606.

23. loc.cit.

24. G.H. 23/11. Letter dated 30 November 1842.

25. loc.cit.

In August 1842 the judges gave their reasons for refusing to recognize the Robben Island Committee.²⁶ They stated that the Legislative Council could not lawfully resolve itself into a committee, or appoint any committee of its members, for the purpose of exercising and performing any of its functions and duties, other than those specified in the Royal Instructions constituting the council, or according to the Standing Rules and Orders framed under the Royal Instructions.²⁷ They held that the Robben Island Committee was not a lawfully constituted committee, as envisaged in the Royal Instructions and the Standing Rules and Orders, and stated that none of its resolutions were binding on any persons or of any legal force.²⁸ Having disposed of the Robben Island Committee, the judges proceeded to define the powers of the Legislative Council. They stated that both in ordinary session and in committee, the Council had no right, power or authority to take the evidence of any person who did not voluntarily give that evidence, or to compel any person to give or furnish any evidence or information, either verbally or in writing, or to compel the attendance of any person.²⁹

They informed the Governor of their willingness to furnish him with any information at their disposal, provided it did not endanger or compromise their own independence, or that of the Supreme Court.³⁰ They were prepared to furnish the information, either at his own request, or

26. G.H. 28/20. Enclosures to dispatches, p.588-603.

27. loc.cit., p.589-598.

28. loc.cit., p.594-595.

29. loc.cit., p.601-602-

30. loc.cit., p.602.

at the suggestion of the Legislative Council. Finally they expressed their willingness to attend the Legislative Council when the Governor deemed it necessary, and stated that they would answer questions put by him, or in his absence, on his instructions and with his sanction.³¹

On 3 August 1842 the Governor called a special meeting of the Legislative Council in order to bring the judges' opinion to the notice of the members. Kilpin provides the following description of what transpired;³²

'When the document was read to the Council there was an ominous pause in the proceedings. Someone asked the Governor if he had any remarks to offer? No, he had none. There was another pause, and advocate Cloete, controlling himself with some difficulty, moved the adjournment of the Council.'

When the Council reconvened on 10 August 1842, Cloete moved twenty-four resolutions on the 'extra-judicial' opinion of the judges, and on what he held to be an undue and unconstitutional exercise of their functions, and an improper interference with the legislature.³³ One of the resolutions stated that;³⁴

'If the Governor and the Council be not possessed of the power of appointing any committee, or sub-committee of the Council, to inquire into and report upon any matters, which may appear to them called for by the general interests of the colony, upon any subject legitimately brought before the council; it would be far more desirable to abolish the Legislative Council in toto, than to insult the public, by the mockery and semblance of such an impotent interference of the public in the legislation and government of the colony, as would be presented by a Council thus constituted.'

31. loc.cit., p.603

32. Ralph Kilpin, The Romance of a Colonial Parliament, London : Longmans, Green & Co., 1930, p.65.

33. Kilpin, op.cit., p.66.

34. The South African Commercial Advertiser, 17 August 1842.

At the next session of the Council, the 'Chairman' of the Robben Island Committee moved an additional ten resolutions on the alleged 'extra-judicial' opinion of the judges.³⁵ He explained that the Committee had not claimed the authority to compel witnesses to give evidence before it, but had only requested the attendance of those persons, who were willing to assist in the investigation.³⁶ William Porter, the Attorney-General, dismissed the objections to the alleged 'extra-judicial' opinion of the judges.³⁷ He pointed out that all of the Council's Bills had to be submitted to the judges for perusal and comment. He stated that the judges were justified in giving their reasons for refusing to give evidence, especially as the issue involved a review of the powers, privileges and functions of the Council. However he was of the opinion that a power of inquiry was implicit in the Royal Instructions, and stated that it could best be executed through committees. According to Porter, the issue was one of delegation, and he proposed that the British government be approached for a ruling. The resolutions were put to the Council, and Porter's proposal scraped through by a majority of one vote.³⁸

The matter was brought to the attention of the Secretary for Colonies in November 1842.³⁹ The Governor felt that the judges had done their duty by resisting the unconstitutional assumption of powers by the Committee. He

35. G.H. 28/20, loc.cit., p.608-610.

36. A surprising statement in the light of the known facts.

37. J R Putzel, William Porter and Constitutional Issues at the Cape 1839-1873, Unp. MA thesis, UCT, 1942, p.14.

38. Cloete's and Ebdon's resolutions were lost by one and three votes respectively.

39. G.H. 23/11. Letter dated 30 November 1842.

pointed out that, if it had been the intention of the Committee to require the judges to fulfil a moral obligation, the object could have been achieved by applying to him in the first instance. He concluded by stating that the Council had abandoned what was conceived to have been the original position of the Committee. The correctness of the judges' opinion was confirmed by the Law Officers of the Crown on 3 July 1843.⁴⁰ They were of the opinion that the Legislative Council possessed no inherent powers, and that it had no right to compel witnesses to give evidence before it.

In May 1844 the members of the Legislative Council attempted to bypass the ruling by redrafting the Standing Rules and Regulations. They introduced a rule which authorized the Council, or a committee of the Council, to compel witnesses to give evidence before either body. However Judge Menzies rejected the rule.⁴¹ He pointed out that the Governor was expressly prohibited from proposing or giving assent to any measure which affected the constitution of the Council, and he stated that the measure would be declared null and void. He warned the councillors that if they persisted and adopted the rule, the judges would adopt the same path of action which they had taken during the Robben Island dispute. He concluded by stating that it could hardly be in the public interest to place the judges in a predicament which would force them to refuse to comply with the Standing Rules.

40. Putzel, *op.cit.*, p.15.

41. LCA, vol.15. Observations by Judge Menzies dated 27 May 1844.

The counsellors decided to withdraw the contentious rule, and when the revised Rules and Orders were considered on 31 May 1844, it was expunged. The former Chairman of the Robben Island Committee, still smarting from the rebuff which the judges had dealt him, refused to concede the issue. He proposed that a committee be appointed to report on the advisability of obtaining 'some mode of requiring as of right, the attendance of such witnesses as it may from time to time be necessary to examine'.⁴² Although the motion was carried unanimously, the Legislative Council never acquired the right to compel witnesses to give evidence before it.

Kilpin⁴³ and Putzel⁴⁴ have suggested that the judges went too far in exposing the weakness of the Legislative Council. George⁴⁵ interprets the judges' action as a veiled attack on John Bardwell Ebdon as the main spokesman against any interference with the rights and privileges of the Council. However it is submitted that the historians overlooked the fact that a major constitutional issue was at stake, namely the subordination of the judiciary to the local legislative authority. Nonetheless it must be conceded that;⁴⁶

'By exposing the weakness of the council, the judges had done more harm than good, and that they had gone to unnecessary extremes, almost every moderate-minded man agreed.'

The cumulative effect of the past events had finally convinced the Secretary for Colonies to tame the 'lions'.

42. Marian George, John Bardwell Ebdon His Business and Political Career at the Cape 1806-1849, Unp. MA thesis, UCT, 1980, p.170.

43. Kilpin, op.cit., p.66.

44. Putzel, op.cit., p.15.

45. George, op.cit., p.169.

46. Kilpin, op.cit., p.66.

4.5. REACTION FROM DOWNING STREET

On 4 January 1844 the Secretary for Colonies dispatched letters patent, which empowered the Cape colonial legislature to amend the Charter of Justice.⁴⁷ In an explanatory letter, he stated that from the various dispatches which he had received, it was evident that;⁴⁸

'The public tranquillity and good government of the colony had been prejudiced by the non-existence there, of any power competent to correct any errors which the Charter of Justice might contain, or to adapt the provisions of it to the new exigencies of society.'

He pointed out that the practice of establishing courts of justice by Royal Charters, which were incapable of being changed by the local legislatures, had been borrowed from British India. The underlying principle had been to provide a 'counterbalance to the legislative and executive authority of the government, and to prevent the perversion of government to improper ends'.⁴⁹ He criticized this arrangement, which he called 'most objectionable and inconvenient', and stated that;⁵⁰

'It maintains the chronic evil of rivalry, if not actual hostility, between the judicial and other departments of local government. It generates much unseemly controversy which could hardly arise, and which in point of fact is not found to arise, in colonies where legislation is unfettered by any such restraint. It perpetuates original errors, or principles which in progress of time have become obsolete and inapplicable to the altered conditions of affairs, and it checks progressive improvement in those institutions on which, more than on any other, the well-being of society depends.'

47. ANNEXURE 1.

48. Report from the Committee of the Legislative Council on the Judicial Establishment..., Cape Town : Saul Solomon, 1845, Appendix 4.

49. Report, loc.cit., Appendix 4.

50. Report, loc.cit.

He drew attention to the fact that the judiciary had been subordinated to the legislatures in the Australian Colonies, in Newfoundland, in Ceylon and in the West Indian Colonies. He diplomatically stated that, in introducing the same system at the Cape, the Sovereign was following a 'current of precedents which reached almost every part of the colonial dominions', and that the measure was in no way dictated by a distrust of the judges.⁵¹

He referred to the question of rank and precedence, and directed that a law should be passed to give the Lieutenant-Governor precedence over the judges in the Eastern districts of the colony.⁵² He disapproved of the circuit judges making 'official and formal reports' on subjects not falling within the range of their official duties. He directed that, in the Eastern districts, the circuit reports had to be addressed to the Lieutenant-Governor, who would thereafter transmit them to the Governor with his comments. Finally he ruled that the judges had not exceeded their authority by issuing direct orders to the civil commissioners in the Eastern districts for the purpose of arranging their transport and expenses. He stated that the Lieutenant-Governor's signature was only required as a voucher to prove that the expense had been incurred under lawful authority.

The question of rank and precedence was finally laid to rest in September 1844, when the Governor issued an

51. Report, loc.cit.

52. Report, loc.cit.

Ordinance fixing the precedence of the Lieutenant-Governor in accordance with the Secretary for Colonies' directive. However a more formidable challenge faced the judges, when the members of the Legislative Council, suitably armed with the letters patent, formed a Committee to inquire into the judicial establishment. This time the judges had no hesitation in giving evidence before the Committee.

4.6. THE COMMITTEE OF INQUIRY INTO THE JUDICIAL ESTABLISHMENT

4.6.1. INTRODUCTION

In his finance minute of 28 May 1844, the Governor gave notice of his intention to institute an inquiry into the judicial establishment, and he hinted that he would use the letters patent to legislate on the subject.⁵³ He referred to the estimates of expenditure for 1845, and pointed out that the figures for the judicial establishment amounted to one sixth of the total.⁵⁴ He had therefore decided to institute an inquiry in order to determine the best means for reducing the judicial establishment's share of the budget. However the investigation did not get off the ground until March 1845, when the Governor formally instituted the inquiry and set the terms of reference.⁵⁵ He directed the members to concentrate on the following questions :⁵⁶

53. LCA, vol.15. Minute dated 28 May 1844.

54. An amount of £25,475 was estimated for the needs of the judicial establishment. This was £638 less than the figures for 1844.

55. Report, loc.cit., p.xlvii.

56. Report, loc.cit.

1. Whether additional magistrates should be appointed in new situations, in order to remove supposed inconveniences arising from the distance of many of the inhabitants from the resident magistrates' courts; and if so, whether the existing clerks of the peace might be appointed to these posts.
2. Whether the circuit system was attended with beneficial consequences commensurate with its expense, or whether it could be modified.
3. Whether it was expedient to increase the criminal jurisdiction of the resident magistrates' courts, and also to create district sessions, in which a certain number of resident magistrates would adjudicate on graver cases, subject to an approval of their sentences, above a certain class, by the judges of the Supreme Court or some other competent authority.
4. Whether it would avoid expense and facilitate the administration of justice, if a judge was stationed at Grahamstown.
5. Whether the grand jury system should be extended, abolished or left unchanged.
6. Whether the double journey of witnesses could be safely reduced to a single journey, by means of depositions to be taken and preserved on record, so as to serve at the time of trial in place of the second attendance of the witness.
7. Whether it would be expedient to introduce trial by jury in civil cases at Cape Town and Grahamstown.
8. Whether it would be expedient to establish inferior courts with exclusive civil jurisdiction.

The majority of the members of the Committee decided to disregard the terms of reference, and in the words of the Chairman, the question of expense was 'thrown completely into the background'.⁵⁷ They concentrated, instead,

57. Addenda to the Report and Minutes of Evidence of the Committee of the Legislative Council on the Judicial Establishment, Cape Town : Saul Solomon, 1846, p.5.

on how 'efficiency, justice and humanity could best be promoted'.⁵⁸ This approach was criticized by the Attorney-General, who represented the minority opinion on the Committee. He accused the majority of producing a report which was founded 'not upon what was in the evidence, but what was not'.⁵⁹ As a result, no agreement could be reached, and the Committee members produced separate reports, wherein the issues crystallized into a dispute between those members who propagated the decentralization of the Supreme Court,⁶⁰ and those who favoured the maintenance of a centralized Supreme Court at Cape Town.⁶¹

4.6.2. THE MAJORITY REPORT

The members adopted, as a test of efficiency, the rule that an accused should obtain an impartial trial as soon after his committal as was consistent with the ends of justice, regard being had to the nature of the country and the extent of its financial resources.⁶² They produced a Table⁶³ which demonstrated that for the period 1828-1833, awaiting trial prisoners, who were facing prosecution in the Supreme and circuit courts, had spent an average of 119.1 days in custody. The statistics further revealed that in Cape Town and the Cape district, where quarterly sessions were held, the average period of detention was 53.6 days. In the country districts, where twice yearly circuit courts were held, the average

58. Addenda to the Report, loc.cit.

59. Addenda to the Report, loc.cit., p.22.

60. The majority report.

61. The minority report.

62. Report, loc.cit., p.iv.

63. ANNEXURE 2.

period of detention was 134.8 days. They pointed out that they were not in possession of similar returns for the period 1834-1844. However from the return for the three year period ending on 30 June 1844, it appeared that 79 witnesses were detained in custody for an average of 35 days.⁶⁴ Of these, one fifth were detained for an average of 109.75 days, the longest period of detention being 198 days.⁶⁵ The members were of the opinion that the institution of quarterly criminal sessions at each of the district towns, and half-yearly sessions at other central sites amongst the country districts, would greatly reduce and modify the contrast which existed between the Cape division and the country districts.

They found that there was much dissatisfaction with the system of impressment, which was used for the transport of the circuit judges. The evidence had revealed the following causes of complaint :⁶⁶

1. The shortness of the stages for which the relays were generally impressed.
2. The great distances from which, in many instances, the parties were brought to the line of the road.
3. In the district of Albany, and along the road from Port Elizabeth to Grahamstown, the tariff allowance was much lower than the price paid by individuals.
4. The instructions to place relays of horses in preference to oxen on the line of the road, in districts where horses were not abundant, often resulted in a serious interruption of the business on the farms.

64. Report, loc.cit., p.v.

65. Report, loc.cit.

66. Report, loc.cit., p.viii-x.

5. In thinly populated districts, the distribution of the whole of the requisition among a number of individuals in rotation, as was required by law, instead of procuring as many horses as possible from one supplier.
6. The compulsory supply of transport at certain seasons, when every hand was required for the business of the farm, often resulted in a loss to the farmer.

After touching on the civil business of the Supreme and circuit courts,⁶⁷ and on the expenditure incurred by the judges in securing transport for their circuit work,⁶⁸ they came to the following conclusions :⁶⁹

1. The system of dispensing criminal justice in the country districts, by means of circuit courts, was attended with serious evils both to individuals and society, because of the long period that often intervened between the committal and the trial of accused parties.
2. The evils were greatly aggravated by the defective state of prison discipline, and by the total absence of a system of classification of the prisoners in all the gaols in the colony.
3. Some means of reducing the heavy expenditure, which was inseparably linked with the long circuits, and of alleviating the hardship imposed upon the inhabitants of the country districts by the impressment of transport, had to be devised.
4. The administration of civil justice in the country districts would be rendered cheaper and more accessible, if the court sessions were held more frequently.

67. ANNEXURE 3.

68. Report, loc.cit., p.vii-viii.

69. Report, loc.cit., p.x-xi.

Before putting their proposals, they pointed out that the Committee had been unanimous in agreeing to the following recommendations :⁷⁰

1. That additional seats of magistracy were necessary in the country districts.
2. That this could be effected economically by abolishing the office of clerk of the peace, and by appointing the incumbents to the new seats of magistracy.
3. That the summary jurisdiction of the resident magistrates should be enlarged to three months' imprisonment, with or without hard labour, but that their power of inflicting corporal punishment should be limited to thirty-six lashes.
4. That it would greatly facilitate the administration of justice, if the resident magistrates were allowed to hold courts periodically at different places within their districts.
5. That the civil jurisdiction of the resident magistrates' courts should be increased to cases where the dispute did not exceed thirty pounds.
6. That the grand jury should be abolished.

They were of the opinion that no adequate scheme could be found to remedy the evils, which did not provide for quarterly criminal sessions of jury courts at most of the principal towns in the country districts.⁷¹ They did not consider that the case would be met by removing one of the judges to the Eastern districts, or by appointing an additional judge to reside there. They pointed out that

70. Report, loc.cit., p.xi.

71. Report, loc.cit., p.xii.

in neither case could the half-yearly circuits be done away with. They also rejected a scheme for the creation in each of the several divisions, of a court analogous to the Sheriffs' Courts in Scotland, or the Barristers' Courts in Ireland, on the grounds of expenditure.⁷²

They proposed that trial by jury in civil cases be introduced in all the courts, where the same mode of trial prevailed in criminal cases.⁷³ They pointed out that jury trials would be excluded in all cases of liquid documents of debt and in cases of provisional sentence. The civil juries would try issues of fact, leaving it to the option of either party to call for a common or special jury, or neither. They explained that under this arrangement, it would be unnecessary for more than one judge to preside over civil cases.

They proposed to decentralize the Supreme Court by dividing the colony into five judicial circles.⁷⁴ In each circle a permanent superior local court would be established with jurisdiction comparable to the circuit courts. The Chief Justice would continue to preside over the Supreme Court at Cape Town, which would be attached to one of the circles. The puisne judges would be relocated, each to a separate circle, and two additional judges would be appointed to the remaining circles. The Chief Justice would conduct fortnightly criminal sessions within his circle, and the puisne judges would hold quarterly

72. Report, loc.cit.

73. Report, loc.cit., p.xii.

74. Report, loc.cit., p.xiii.

sessions for the trial of both criminal and civil cases at the chief towns, and half-yearly sessions at the seats of magistracy within each circle. Criminal prosecutions would be conducted by crown clerks, who would be attached to each circle. The crown clerks would act under instructions from the Attorney-General, and would also be expected to act as court registrar and secretary. Appellate jurisdiction would be given to three of the judges, who would meet at such places and on such occasions as was required.

The following resolutions were carried, by the Chairman's casting vote, at a meeting of the Committee which was held on 21 October 1845 :⁷⁵

1. The administration of justice would be improved by dividing the colony into five judicial circles, and by appointing a judge to reside in each, to try criminal cases and questions of fact in civil cases, by juries; and that provision should be made for the hearing of appeals and new trial motions before a court consisting of three judges.
2. A considerable increase in the number of resident magistrates was most urgently required.
3. Clerks of the peace were not a necessary part of the system of public prosecution and might be disposed with in order to provide new magistracies.
4. The jurisdiction of the resident magistrates should be increased in civil cases to thirty pounds, and in criminal cases to three months imprisonment, with or without hard labour; and that their power to inflict corporal punishment be limited to thirty-six lashes.

75. Report, loc.cit., p.xvi-xvii.

5. Crown clerks should be appointed to each of the judicial circles, excepting in Cape Town, in order to conduct criminal prosecutions under the directions of the Attorney-General.
6. The existing system of impressment for the transport of circuit judges should be abolished, and that the judges should be conveyed on circuit by contract or by transport provided by the government.
7. The police force should be remodelled throughout the colony, in order to render it more efficient in the suppression of crime.
8. The grand jury was anomalous, unnecessary and ought to be abolished.
9. The time had arrived when the principle of trial by jury in civil cases should be adopted throughout the colony.

4.6.3. THE MINORITY REPORT

The Attorney-General put the minority report to the Committee on 6 November 1845.⁷⁶ The minority were in favour of maintaining the status quo, although they conceded that the judicial establishment could be improved. They opposed the decentralization of the Supreme Court, on the grounds that it would not benefit the public, and would be a retrograde step in the administration of justice. They were also of the opinion that it would be more expensive than the prevailing system.

They defended the system of circuit courts, which they held to be superior to the proposed system of local courts.

76. Report, loc.cit., p.xxxi-xliii.

They pointed out that the circuit courts generally attracted a Bar, appeals were argued immediately after the close of the circuit, and in cases of difficulty the evidence could be taken on circuit and the cases could then be removed for argument before a full Bench of the Supreme Court at Cape Town. Furthermore the circuit judges could keep up and increase their professional knowledge by listening to the arguments of counsel and by conferring with their colleagues. Local courts, on the other hand, would differ widely in practice, appeals might be held over for a year, and the courts would not be able to induce the attendance of a Bar. In their opinion, the proposed annual reunion of three of the local judges would not prevent them from 'gradually losing whatever law they might originally have possessed'.⁷⁷

They pointed out that the constitution of the Supreme Court would be totally changed by the establishment of local courts, and that there would be a court of appeal from the local courts and nothing more. Whereas the Supreme Court was a court of first instance, and provided the parties agreed, all cases arising in the colony could be brought and determined before it. In questions of law, the case could always be brought before the Supreme Court at the insistence of either party, and where facts were disputed and the witnesses could more readily be heard elsewhere, the case could be removed to the most convenient circuit court and returned if necessary to the

77. Report, loc.cit., p.xxxiv.

Supreme Court for further argument and final determination. Moreover insolvency applications, provisional sentences, special verdicts in criminal cases and similar matters were decided in Cape Town by three judges, assisted by the Bar, in the presence of the public, and under the observation of the press. They were therefore of the opinion that the proposed court of appeal would be a very poor substitute for the Supreme Court, and they supported this contention by stating that no court of appeal, however competent, 'could remedy the mischief which might be done by defective courts of first instance'.⁷⁸

They were opposed to the creation of a local court at Grahamstown on the grounds of expense, and also if it meant that the Bench at Cape Town would have to be reduced. Apart from these considerations, they felt that it would be a desirable development.⁷⁹ However they felt that the expenditure involved could be more beneficially applied to improving the magistracy.

They conceded that the expenditure incurred by the circuit system was considerable, but pointed out that vastness of the territory which had to be covered, the sparseness of the population, and the fact that the costs could not be provided locally, had to be taken into account.⁸⁰ They were of the opinion that the criminal sessions were possibly held too frequently, as was demonstrated by the paucity of the criminal cases, particularly

78. Report, loc.cit.

79. Report, loc.cit., p.xxxii.

80. Report, loc.cit.

in the country districts.⁸¹ They regretted that awaiting trial prisoners had to spend lengthy periods in detention, but pointed out that the hardship of imprisonment only adversely affected the accused persons who were acquitted. They pointed out that the ratio of acquittals amounted to less than nine percent of the committals.⁸² In any event, they were of the opinion that, except at the seat of the local courts, the period of detention would not decrease substantially under the proposed system, as the local judges would still be required to conduct half-yearly circuits within their respective circles.

They agreed that the clerks of the peace were not essential to the system of public prosecution, and they recommended that the office be abolished.⁸³ They proposed that a circuit court prosecutor should be appointed to conduct the prosecutions. He would be stationed at Cape Town and would at all times be responsible to the Attorney-General. The circuit court prosecutor could be chosen from the ranks of the clerks of peace, or the office could be filled by the members of the Bar. In the latter case, it would induce at least two advocates to attend the circuits, as it would be advisable to arrange that a different advocate be appointed to conduct the prosecutions in each town. Under this scheme the resident magistrates would conduct the preparatory examinations. They would transmit the depositions to the Attorney-General, who would decide whether or not to

81. See ANNEXURES 4 and 5 for Tables depicting the number of criminal cases indicted in the Supreme and circuit courts during the period 1828-1844.

82. Report, loc.cit., p.xxxv.

83. Report, loc.cit., p.xxxvii.

proceed with the prosecutions. If there were cases to answer, the Attorney-General would forward the indictments to the magistrates, together with lists of the witnesses who would be required to give evidence. The magistrates would cause the indictments to be served on the accused and would see to the summoning of the witnesses. In the meantime, the circuit court prosecutor would be given the opportunity of discussing the cases with the Attorney-General. When the circuit court prosecutor reached the circuit town, he would be handed, as a brief, a copy of the depositions, and the magistrate's clerk and the chief of police would confer with him regarding any matters connected with the cases. The duty of having the witnesses ready, and of paying their expenses, would be divided between the chief of police and the magistrate's clerk. At the close of the circuit, the prosecutor would be required to furnish the Attorney-General with a report of the cases tried.

They were in favour of the proposal to introduce trial by jury in civil cases. However they suggested that it would have to be done cautiously, and as an experiment at Cape Town.⁸⁴ They pointed out that 'much less acumen was necessary to act as a juror in criminal cases than in criminal proceedings, since it was easier to see when evidence preponderated so overwhelmingly as to leave no reasonable doubt, than to see when it simply preponderated and did no more'.⁸⁵ They were of the opinion that there

84. Report, loc.cit., p.xlii.

85. Report, loc.cit.

were few places in the colony, where it would be possible to empanel a jury to try a civil case of importance, where the issues had not been prejudged, or where the jurors did not stand in some relationship with one or another of the parties. They felt that the time would arise when civil juries could be safely introduced in the circuit districts, but they were not prepared to introduce such a sweeping measure at the present time.

They regarded the grand jury as a 'useless anomaly' which ought to be abolished.⁸⁶ In their opinion, 'it did badly what the petit jury did well' and it provided no check on the public prosecutor.⁸⁷ They criticized the grand jury proceedings, which were conducted behind closed doors, and pointed out that it had deprived the petit jury lists at Cape Town and in the Cape Division of a number of men who would constitute the best members.

4.6.4. REACTION FROM THE JUDGES

The judges appear to have been taken completely by surprise when the Committee published its reports. In December 1845 Judge Menzies advised the Governor that when the judges had given their evidence, they had no intimation that information relating to several prominent matters which had been raised in the reports was required or expected from them.⁸⁸ He therefore requested the Governor to submit additional evidence, which the judges

86. Report, loc.cit., p.xl.

87. Report, loc.cit.

88. Addenda to the Report, loc.cit., Enclosures, p.1.

had compiled, to the Legislative Council and to the Secretary for Colonies.

4.6.4.1. JUDGE MENZIES' EVIDENCE⁸⁹

Menzies pointed out that the judges had not been called upon to give an explanation for the lengthy incarceration to which awaiting trial prisoners had been subjected in the country districts. He regretted the fact that the Committee had failed to obtain returns reflecting the position during the six year period preceding the inquiry, as he was of the opinion that the average period spent in confinement had been greatly reduced. He explained that, in many instances, the accused could not be tried at the first sitting of the circuit court, because delays were experienced in having the indictments served on them. Before it was possible to serve an indictment, a preparatory examination had to be conducted and the record had to be transmitted to the Attorney-General's office at Cape Town. The Attorney-General had to personally draw the indictment after studying the evidence. He then had to forward it to the clerk of the peace for service on the accused. Unless service was effected ten free days before the first sitting of the circuit session, the case had to stand over until the next circuit. Menzies recommended that the induciae be reduced from ten days to forty-eight hours, and stated that it would result in a considerable reduction in the average period of imprisonment

89. Addenda to the Report, loc.cit., p.1-15.

between committal and trial.⁹⁰ He criticized the return which had shown that 79 witnesses had been detained in custody for an average period of 35 days.⁹¹ He pointed out that the information was incomplete, as it did not state how many of the witnesses were accomplices, or who were merely receiving food and lodging on the premises of the gaol. He stated that 35 of the 79 witnesses were confined at Cradock, and that most of them were allowed to remain outside the prison.⁹²

He referred to the complaints concerning the transportation of the circuit judges, and stated that they had arisen as a result of the delays experienced in receiving payment. In his opinion, the cause of dissatisfaction had been removed by a regulation of 7 November 1844, which directed that all transport furnished for public service had to be paid for in cash, at the time, and on the spot.⁹³ Furthermore the judges felt confident that by travelling longer stages with the same horses, when the means of transport were not to be found close to the road, and by other arrangements which they could suggest to the civil commissioners, they could not only reduce the expense incurred, but could remove most of the causes of complaint referred to in the majority report.

He was therefore of the opinion that the reasons, which had been advanced in the majority report for altering the

90. Addenda to the Report, loc.cit., p.2.

91. See 4.6.2.

92. Addenda to the Report, loc.cit.

93. Addenda to the Report, loc.cit., p.3.

constitution of the Supreme Court, were not as important as had been represented. He felt that even if the 'evils' existed to the full extent as was represented, they were not of sufficient magnitude to justify the alteration of the constitution of the Supreme Court in any of the ways suggested.⁹⁴ He proposed that if the constitution of the Supreme and circuit courts had to be altered, it would be preferable to appoint two additional judges to reside at Grahamstown and Graaff-Reinet respectively.⁹⁵ The Chief Justice and the two puisne would continue to reside at Cape Town, and would, in turn, conduct quarterly sessions in the Cape, Stellenbosch, Swellendam, George, Worcester and Clanwilliam divisions. The additional judges would hold quarterly sessions in each of the seats of jurisdiction within their territorial circles. However their power, authority and jurisdiction would be restricted to that of a circuit judge.⁹⁶ According to this plan, the Supreme Court would maintain its jurisdiction throughout the colony, while retaining its seat at Cape Town.

He pointed out that if the majority plan was implemented, it would almost entirely break up the Bar, and would deprive both litigants and prisoners of having the assistance of counsel. On the other hand, if his own proposals were rejected, there would be no alternative, but to retain the Supreme and circuit courts as constituted, with the restoration of a fourth judge, and by having

94. Addenda to the Report, loc.cit.

95. Addenda to the Report, loc.cit., p.4.

96. Addenda to the Report, loc.cit.

quarterly circuits throughout the colony, by one judge in rotation. However this would greatly increase and aggravate the expense and difficulty of providing transport for the circuit judges.

He disagreed with both the majority and the minority proposals that the office of clerk of the peace should be abolished.⁹⁷ He considered the clerk of the peace to be an essential part of the system of public prosecution, and he stated that any other arrangement would destroy the uniformity of the system. He pointed out that it had not been alleged in any of the evidence taken by the Committee, or by any of the members, that the clerks of the peace had not performed their duties faithfully and efficiently, or that the system of which they performed so important, if not an essential part, had not worked well.⁹⁸

He considered the proposals to introduce jury trials in civil cases to be most objectionable and inexpedient.⁹⁹ He pointed out that only three of the witnesses who had been examined by the Committee, had recommended its introduction throughout the colony. The rest, who were not opposed to its introduction, had recommended that civil jury trials be restricted to Cape Town and Grahamstown, and then only in certain classes of cases. He felt that if the experiment had to be made, it should be restricted to the Supreme Court at Cape Town.

97. Addenda to the Report, loc.cit., p.11.

98. Addenda to the Report, loc.cit.

99. Addenda to the Report, loc.cit., p.5.

4.6.4.2. THE EVIDENCE OF SIR JOHN WYLDE AND JUDGE MUSGRAVE¹⁰⁰

Both judges agreed in principle with the observations and conclusions which had been made by Menzies. In addition, they submitted separate memoranda opposing the plan to decentralize the Supreme Court.¹⁰¹ Sir John Wylde was alone, however, in favouring the retention of the grand jury. He made the following impassioned plea which was heeded by the authorities, and the grand jury survived until 1885;¹⁰²

'Let the whole world pronounce the grand jury to be a "useless anomaly". The man for whom the verdict of "not a true bill" has been justly found by the grand jury will have good reason under his title as a British subject to perfect justice.'

4.6.5. THE DEBATE ON THE COMMITTEE REPORTS

The Legislative Council met on 4 December 1845, in order to consider the reports and the additional evidence submitted by the judges. At the same time, the Attorney-General presented a petition from 19 Cape Town attorneys, who were opposed to the proposed decentralization of the Supreme Court.¹⁰³ After a lengthy debate, the resolutions contained in the majority report were carried by a majority of two votes. John Montagu, the Colonial Secretary and Chairman of the Inquiry, had succeeded, notwithstanding the combined opposition of the Bench, the Bar and the

100. William Musgrave was appointed second puisne judge in the place of Kekewich who retired on 12 October 1843.

101. Addenda to the Report, loc.cit., p.27-33.

102. Act No. 17 of 1885.

103. Addenda to the Report, loc.cit., p.35-37.

majority of the Cape Town attorneys. The supremacy of the legislature had been forcefully demonstrated and the 'lions' had been tamed. Montagu's success, however, turned out to be a Pyrrhic victory, as the Secretary for Colonies refused to allow the decentralization of the Supreme Court.

4.7. THE EMERGENCE OF A CENTRALIZED SUPREME COURT AT CAPE TOWN

Although the Secretary for Colonies had been notified of the outcome of the Inquiry in February, he only replied on 4 December 1846.¹⁰⁴ He pointed out that the maintenance of fundamental principles and fixed institutions were conditional to every real local improvement. He regarded the maintenance of a Supreme Court at the Capital, exercising jurisdiction throughout the colony, to be a stable, if not immutable, principle of the judicial system of the Cape of Good Hope. He informed the Governor that he was not prepared to abandon the models of England and those of almost every other British colony, and stated that he knew of no other effective security against the 'silent growth of conflicting systems of law and of judicial practice'.¹⁰⁵ He explained that;¹⁰⁶

'Not only did the weight of the judicial character and office, and the proper relations between the judicial authorities and the other powers of the state, depend on the maintenance of one such central and superior court, but without it there was no adequate security that judges of high qualifications,

104. G.H. 1/180. Letter dated 4 December 1846.

105. loc.cit., p.8.

106. loc.cit., p.9.

and that a Bar distinguished by learning, by ability and by spirit of independence, could subsist in any country. The judges of such a central tribunal appeared, from time to time, on their circuit as honoured and as impartial visitors, and by these methods that institution...was invested with the dignity, efficiency and the high moral character necessary to the discharge of its duties.'

He was of the opinion that the plan to divide the colony into five judicial circles would sacrifice the above-mentioned advantages, and he objected to the decentralization of the Supreme Court on the following grounds :¹⁰⁷

1. It was altogether new and experimental.
2. There was no proof that either the promptitude or the economy anticipated would be realized.
3. It would result in the distribution of judges with inferior salaries and therefore with inferior qualifications.
4. The judges would be cut off from social and other resources, which were necessary and indispensable for the wise discharge of the judicial office.
5. With no effective Bar to watch him, and no colleagues to stimulate and aid him, the local judge would have every temptation to become self-indulgent and dogmatical.
6. The judges would be tempted to make the law for the occasion, instead of laboriously searching for it.
7. The remedy of an appeal would not provide effective security against these abuses, nor against the tacit growth of as many different systems of law as there were different judges, because only a very small portion of judgments were taken on appeal.

¹⁰⁷. loc.cit., p.10.12.

He had therefore come to the conclusion that the proposed plan would lead to the establishment of a system of 'judicial tyranny'.¹⁰⁸

He referred to the necessity for maintaining a responsible public prosecutor for the administration of the criminal law, and pointed out that the system prevailed in Scotland and in most of the colonies. He stated that the system virtually prevailed in Ireland and that public opinion was beginning to call for its extension to England.¹⁰⁹ He was therefore most unwilling to retract the system at the Cape, and he stated that the prosecution of crime could not be left to the 'caprice, the passion or the interest of private prosecutors'.¹¹⁰

Having made short shrift of the proposed emasculation of the Supreme Court, the Secretary for Colonies laid down the following guide-lines for the future administration of justice at the Cape :¹¹¹

1. The existing constitution of the Supreme Court had to be maintained.
2. The office of deputy public prosecutor, whether designated clerk of the peace or by any other title, had to be maintained.
3. There had to be an increase in the number of resident magistrates for the prompt and effective administration of the law in all petty cases.
4. No retrenchment in the expenditure on the courts and the judges was to be made, if it meant sacrificing any of the fundamental principles.

108. loc.cit., p.13.

109. loc.cit., p.14.

110. loc.cit.

111. loc.cit., p.18-30.

5. Whatever was essential for the protection of the Sovereign's subjects, in their persons, their property and their reputation, had to be provided at the public expense.
6. No changes were to be made unless they were supported by clear and weighty reasons.
7. In all future changes, the English system of administration of justice had to be constantly borne in view, as the model to which the colonial institutions should, as far as possible, be assimilated.
8. The proposal for the abolition of the grand jury was approved.
9. The imprisonment of witnesses, simply because they could not find bail for their appearance, was oppressive and absurd.
10. Gaol deliveries could be easily effected without multiplying either the circuits or the number of judges, by the simpler process of issuing commissions in which some of the advocates might be associated with the judges, so that as in England, the junior commissioners might execute the commissions while the judges were at Cape Town, and by reserving all cases of difficulty and importance for the regular circuits.
11. The practice of compulsory impressment of waggons and oxen for circuit transport was inappropriate and had to cease.
12. Trial by jury in civil cases could be introduced at Cape Town on an experimental basis.

The Secretary for Colonies concluded by stating that the Legislative Council had taken on 'too heavy a task and had aimed at accomplishing too much at once'.¹¹² He pointed out that his object had not been to discourage the

¹¹². loc.cit., p.32.

legislators, but to animate their exertions, by directing them into the 'proper channels' and by confining them within the 'proper bounds'.¹¹³

4.8. THE CAPE SUPREME COURT AND NATAL

4.8.1. INTRODUCTION

During the period when the future of the Cape Supreme Court was being investigated by the Committee of Inquiry, Natal was annexed as a separate district of the Cape Colony.¹¹⁴ As it would have been impractical to extend the circuits to the newly acquired district, the Cape legislature decided to establish a separate superior court in Natal. The District Court of Natal was accordingly established by an Ordinance¹¹⁵ of the Cape Legislative Council, which was promulgated on 16 October 1845. Although the district of Natal was separated from the Cape Colony in 1847, the Cape Supreme Court continued to exercise appellate jurisdiction over the Natal District Court until 1853. It is therefore necessary to take a closer look at the relationship between the two courts, especially as it sheds some light onto the development of judicial precedent.

At the time of the annexation, Roman Dutch Law formed the basis of the legal system of Natal, insofar as the white inhabitants were concerned. As the majority of the white inhabitants were of Cape Dutch origin, the Cape authorities

113. loc.cit., p.33.

114. Although the annexation took place on 31 May 1844, the letters patent were only promulgated on 21 August 1845.

115. Ordinance No. 14 of 1845.

decided to retain the legal system, and to bring it into line with 'the Roman Dutch Law, as the same has been and is accepted, and administered by the legal tribunals of the Colony of the Cape of Good Hope'.¹¹⁶ The 'reception', however, did not include the Cape colonial legislation, as the Governor felt that it would be impossible to transfer the Cape Ordinances 'thither in the lump'.¹¹⁷ He pointed out that any such attempt would be a 'nugatory act', as the Ordinances would not work 'for want of the officers and arrangements by which they themselves specify that they are to be worked'.¹¹⁸ He intended to build up the legal system of Natal by means of separate Ordinances, generally analagous in substance to those in force at the Cape, but drafted with due regard to local requirements.

4.8.2. THE NATAL DISTRICT COURT¹¹⁹

The Ordinance establishing the District Court of Natal provided for the appointment of a single judge, who was to be known as the Recorder of Natal. The Cape Governor was authorized to appoint the recorder from the ranks of the English, Irish, Scottish or Cape Bars.¹²⁰ The candidate had to be a 'fit and proper person' and was to hold office 'quamdiu se bene gesserint'. Officers of the court had to be appointed in conformity with the Cape practice and their duties had to correspond to those performed by the sheriff, registrar and master of the Cape Supreme Court.¹²¹ The recorder was authorized to

116. Ordinance No. 12 of 1845.

117. G.H. 1/179. Letter dated 10 January 1846.

118. loc.cit.

119. See generally, P.R.Spiller, The Natal Supreme Court : Its Origins and Early Development (1858-1874), Unp. Ph.d. thesis, University of Natal, 1982.

120. Ordinance No. 14 of 1845.

121. loc.cit.

admit both advocates and attorneys.¹²² Owing to the shortage of qualified practitioners, and with due regard to local requirements, provision was made for the admission of attorneys who lacked formal qualifications, but were of 'good fame and credit'. Criminal trials were to be conducted by the recorder and a jury of nine men who had to reach an unanimous verdict. Civil trials were to be conducted by the recorder sitting alone.¹²³ The seat of the court was to be Pietermaritzburg, and the Lieutenant-Governor of Natal was authorized to divide the district into two divisions, for the purpose of conducting half-yearly circuits in each division. The recorder was authorized to frame rules of court, 'in conformity with the corresponding rules, orders and regulations in use in the Supreme Court at Cape Town'.¹²⁴

Criminal cases could be removed to the Cape Supreme Court for the determination of questions of law, after a verdict had been pronounced by the jury.¹²⁵ For purposes of appeal in civil cases, the court was deemed to be a circuit court of the Cape Colony.¹²⁶ The Cape Supreme Court was authorized to remit any case referred to it by the Natal District Court, with directions as to further proceedings.¹²⁷ The two courts were given reciprocal rights to remove cases on the grounds of convenience, and the reciprocity extended to the execution of judgments.¹²⁸

122. loc.cit.

123. Civil jury trials were introduced in 1852.

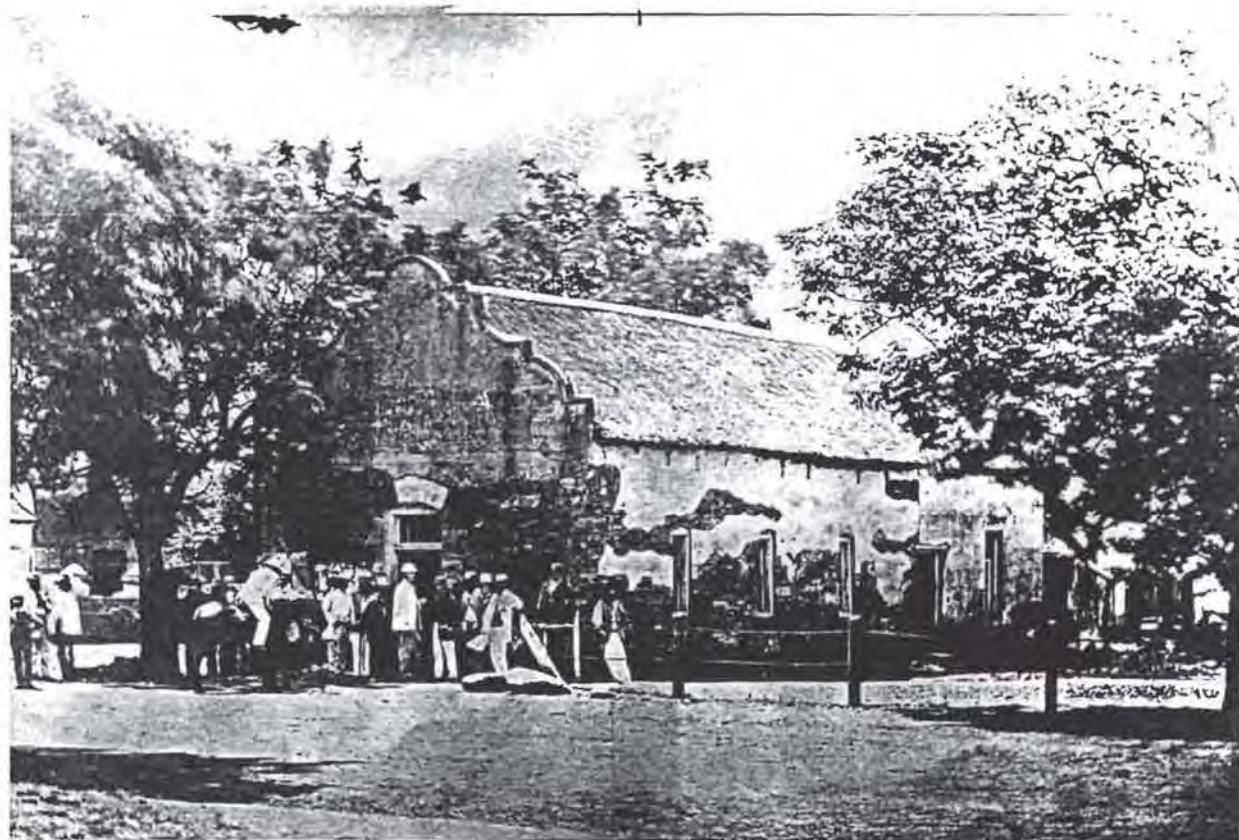
124. Section 29, Ordinance No. 14 of 1845.

125. Section 28.

126. Section 31.

127. Section 33.

128. Sections 34 and 35.



THE NATAL DISTRICT COURT

4.8.3. THE FIRST RECORDER OF THE NATAL DISTRICT COURT

Hendrik Cloete was officially appointed to the Natal Bench on 13 November 1845.¹²⁹ He arrived in Natal on 3 December, and was sworn into office by the Lieutenant-Governor on 13 December 1845. According to Bird, the Cape Governor considered Cloete to be 'the only advocate at the Colonial Bar to whom he could offer the appointment'.¹³⁰ The recorder was granted an annual salary of £600, together with a housing allowance of £100.¹³¹ He took his seat on the Bench in the old Raadzaal which had been converted to serve as a courthouse. The building, which did not have much to boast of in the way of architecture, was constructed of stone and was covered by a thatched roof. Flanagan provides the following description of the interior of the courthouse;¹³²

'The floor, probably of mud, was always in a dreadful condition during the squalls which accompanied the rains, and its state rendered it almost physically impossible to continue the sessions of court. The strong wind which frequently blew from the West made it extremely difficult for the members of the Bar to occupy the seats, with regard either to their health or the safety of their papers.'

Cloete proved to be a highly volatile person, whose conduct has been both highly praised and criticized. According to Phipson;¹³³

'The decisions of the present Recorder being generally so clear, fair and impartial, as to leave even the losing party little ground for complaint; and though he combines in himself (in civil cases) the

129. Natal Blue Book, 1850, p.94.

130. J.Bird, The Annals of Natal, 1495 to 1845, Pietermaritzburg, 1888, vol.2, p.471.

131. Brigid Flanagan, Henry Cloete in Natal, 1843-1855, Unp. M.A. thesis, UNISA, 1946, p.38.

132. Flanagan, op.cit.

133. R.N.Currey, Letter & other writings of a Natal Sheriff, Thomas Phipson 1815-1876, Cape Town : OUP, 1968, p.54.

offices of judge, jury and chancellor, administering equity as well as law, all in one judgment, yet there appears little improvement to be hoped for, from any future accumulation of a whole row of big-wigs on the Bench.'

Spiller's assessment of Cloete reads as follows;¹³⁴

'In the final analysis, one is left with a deep feeling of admiration for Cloete and his legal abilities. His talent, learning, high ideals, desire to educate and adjudicate well, his love of the law and devotion to duty, shone as splendid lights in the otherwise grey setting of the Natal legal system of the mid-nineteenth century.'

On the other hand, Hattersley considered Cloete to be 'constitutionally prone to hastiness of speech, of an arbitrary turn of mind, and capable of reckless partisanship in matters affecting himself'.¹³⁵ According to Flanagan;¹³⁶

'He was unreasonably jealous of his own honour, and was quick to assume bad intentions on the part of the Colonial government and to put himself in opposition to it. Cloete's quickness of temper and hastiness of speech were not the only faults that militated against his popularity. He seemed almost incapable of keeping out of debt, and his finances were always in a hopeless condition. Rumours were current that Cloete's attempts to keep on the right side of his creditors exercised an influence on his administration of justice. Even if these reports were groundless, his inability to pay his way reflected little credit on a person occupying such a prominent position in the community.'

Cloete's volatile conduct was brought to the attention of the Secretary for Colonies in 1852. His conduct in the case of Meller v. Buchanan¹³⁷ was made the subject of

134. Spiller, op.cit., p.20.

135. A.F.Hattersley, The Natalians : Further Annals of Natal, Pietermaritzburg, 1940, p.137.

136. Flanagan, op.cit., p.39.

137. (1852) I Searle 260.

an inquiry. The Natal Executive Council unanimously found that Cloete had been 'guilty of the misconduct of allowing his private feelings to influence his judicial proceedings, and that he ought therefore to be suspended from office'.¹³⁸ On 12 April 1853 Cloete was accordingly suspended. He subsequently took the matter on appeal to the Judicial Committee of the Privy Council, where his conduct was exonerated, and he was reinstated to office.

On 9 October 1855 Cloete relinquished the Recordership in order to take up a position on the Cape Supreme Court Bench.

4.8.4. THE RELATIONSHIP BETWEEN THE CAPE SUPREME COURT AND THE DISTRICT COURT OF NATAL 1846-1853

During the period 1846-1853 very little business was referred to the Cape Supreme Court. One criminal case was referred for the determination of a question of law,¹³⁹ three cases were referred on grounds of convenience,¹⁴⁰ and two cases were taken on appeal.¹⁴¹ In the case of Fielden v. Anstie and Buchanan,¹⁴² the Cape Supreme Court held that it no longer exercised appellate or other jurisdiction over the District Court of Natal. The court found that, owing to an oversight, the Natal District Court Ordinance had lapsed.¹⁴³ The Natal legislature had passed an Ordinance re-enacting the lapsed Ordinance, but the judges held that legislature 'could not make and

138. Natal Executive Council Minutes, Vol.5, Meeting 102, 8 April 1853.

139. R v. Lea 1846 SC 1/2/1.

140. Williams v. Blenkinsopp 1847 SC 1/5/4; Johnston v. Agents of the Assignees of Estate Byrne (1852) I Searle at p. 157; Meller v. Buchanan (1852) I Searle 260.

141. Evans v. Van der Plank and Cleghorn (1852) I Searle 252; Fielden v. Anstie and Buchanan (1853) 2 Searle 15.

142 (1853) 2 Searle 15.

143 The British Sovereign had failed to confirm the Ordinance within the period prescribed by the Royal Charter.

establish laws having force or effect, except within the district itself'.¹⁴⁴

The relationship which had existed between the two courts was raised in the case of Meller v. Buchanan.¹⁴⁵ Commenting on the position, Cloete stated that;¹⁴⁶

'The District Court, here, partakes of the character of a circuit court in the Cape Colony, and is vested with precisely the same powers and authority as the single judge exercises on circuit throughout the Cape Colony; it is, in that respect, ancillary to the Supreme Court, to whom it may refer any cases, precisely as the judge on circuit...Both courts are subject to the same system of laws. They belong to the same supreme government, and their mutual co-operation and assistance is essential to the well-being of, and to a proper administration of justice throughout Southern Africa.'

In Ex parte Byrne,¹⁴⁷ Cloete pointed out that the rules governing pleadings were 'almost copied from those of the Supreme Court'. Moreover, he recognized the authority of the Supreme Court precedents. To his credit, in Visagie v. Harding,¹⁴⁸ Cloete supported his judgment, by referring to a decision of the Cape Supreme Court in which he had appeared as an advocate, and which had gone against his client. However he was not prepared to follow the decisions of the Cape Supreme Court if, in his opinion, they departed from the Roman Dutch Law. Thus, in Zietsman v. Benningfield¹⁴⁹ he stated the following;

144. Wylde C.J. and Bell J. concurring; Musgrave J. dissenting.

145. (1852) I Searle 260.

146. Natal Witness, 23 July 1852.

147. 1851 SC 1/11/2.

148. 1852 SC 1/5/31.

149. Natal Witness, 19 January 1849.

'Assuming that the Supreme Court, or a majority of that court, may have given provisional judgment in a case precisely similar to the present, this court is still bound to declare that the principles and authorities upon which the law is to be administered must be held more sacred by this court, in any cases; and that where the legal authorities appear conclusive and pertinent, the court is bound, and conscientiously follows their direction, leaving it to the aggrieved party to obtain the reversal of its judgment, by a formal appeal, for which the court needs hardly add it will ever be willing to afford the greatest facility.'

In conclusion it can be stated that, although Natal had received the Roman Dutch Law which had been 'accepted and administered by the legal tribunals of the Colony of the Cape of Good Hope',¹⁵⁰ Cloete was not prepared to blindly follow the decisions of the Supreme Court, if he considered them to be incorrect. In practice, however, he remained faithful to judicial precedent, 'and there was no danger that his whim or fancy would lead him into purely subjective decisions'.¹⁵¹

4.9. CONCLUSION

By antagonizing the Lieutenant-Governor and by refusing to kowtow to the Legislative Council, the judges had provoked the British authorities into subordinating the judiciary to the legislative power. The judges had become 'lions under the mace rather than under the throne.' However in wielding the mace, the members of the Legis-

150. Ordinance No. 12 of 1845.

151. Spiller, op.cit., p.90.

lative Council went too far, when they attempted to emasculate the Supreme Court. The British authorities were still actively pursuing a policy of anglicization at the Cape, and the Secretary for Colonies was not prepared to abandon a centralized Supreme Court at Cape Town, which he saw as the main instrument for promoting change in the legal system.

It was also apparent that the judges were achieving uniformity in the decisions of the Supreme and circuit courts, and that judicial precedent was flourishing. This was confirmed by the Attorney-General in his defence of the Supreme Court before the Legislative Council.¹⁵² In his address, the Attorney-General referred to the success which had been achieved by the judges in correcting the conflicting decisions of the circuit courts, which had occurred soon after the implementation of the Charter of Justice. He stated that the judges had succeeded in correcting the 'evils' by mutual co-operation, and he attributed this to;¹⁵³

'The action of the Supreme Court, and to the extent to which discussion in Cape Town had established principles that were being recognized as precedents on circuit.'

He praised the consistent decisions which had been given by the judges, and drew attention to the rarity of appeals from the circuit courts.¹⁵⁴ Further support for the recognition of judicial precedent can be found in the evidence of advocates Cloete and Ebden.¹⁵⁵ Both of whom

152. Addenda to the Report, loc.cit., p.30-42.

153. Addenda to the Report, loc.cit., p.33.

154. There were 21 appeals to the Supreme Court during the three year period ending on 30 June 1844.

155. Report, loc.cit., p.xlv; and also at p.135.

opposed the decentralization of the Supreme Court, on the grounds that it would result in a want of uniformity in the decisions of the courts. Finally the decisions of the Supreme Court, as compiled by Judge Menzies,¹⁵⁶ and the early decisions of the Natal District Court, provide substantial evidence that the decisions were being recognized and accepted as a source of law, both at the Cape and Natal. However it is also clear that the individual judges were not prepared to be bound by the decisions, if they considered them to be incorrect.

156. Menzies' Reports (1828-1849). The reports were edited by Judge Buchanan, and published in 1870.

ANNEXURE 1

VICTORIA, BY THE GRACE OF GOD, OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, QUEEN, DEFENDER OF THE FAITH. TO ALL WHOM THESE PRESENTS SHALL COME, - GREETING.

Whereas His late Majesty King William the Fourth, by his letters patent, bearing date the fourth day of May, in the second year of his reign, and in the year of our Lord one thousand eight hundred and thirty-two, did grant, ordain and appoint, that there should be within the colony of the Cape of Good Hope one supreme court of justice and certain subordinate or circuit courts, to be holden and therein mentioned; and it was thereby, amongst other things, provided, that nothing therein contained should extend, or be construed to extend, to prevent his said late majesty, his heirs, and successors, from repealing the said letters patent, or any part thereof, or from making such further or other provision, by letters patent, for the administration of justice, civil and criminal, within the said colony, and for places then, or at any time hereafter to be annexed thereto, as to his said late majesty, his heirs, and successors should seem fit, in as full and ample a manner as if the said letters patent had not been made, the said letters patent or anything contained therein to the contrary anyway notwithstanding; And whereas experience has shown that the provisions of the said recited charter, from time to time, require amendments for the adaption thereof to the exigencies of society within the said colony, but inasmuch as no authority exists within the same competent to that purpose, the making of such amendments is attended with great difficulty and delay; now therefore for the avoidance of the inconvenience aforesaid, and for promoting the administration of justice within the said colony, we, of our special grace, mere motion and certain knowledge, have granted, appointed and declared, and do hereby, for us, our heirs, and successors, grant, appoint, and declare, that it shall and may be competent to the governor, or to the officer for the time being administering the government of the said colony, by any laws or ordinances to be by him from time to time made, with the advice and consent of the legislative council of the said colony, to make provision for the better administration of justice within the said colony, and for altering and amending the constitution of the supreme court, or of any other court of civil or criminal justice within the same, and for regulating the manner of proceeding within such courts, or any of them, and the limits, whether territorial or otherwise, of the jurisdiction of said courts respectively, and the times and places of holding such courts, and the number and functions of the officers to be employed in and about the administration of justice,

in or under the orders of the said courts respectively, and the powers and authorities of the judges and other officers of the said respective courts, and all other matters and things incident to, or which to them may appear necessary for economical, prompt, and effective administration of civil and criminal justice within the said colony and its dependencies; and all such laws and ordinances so as to be made as aforesaid, shall within the said colony and its dependencies have the same force and authority as any other laws or ordinances of the said governor and legislative council, anything in the said recited charter or letters patent contained to the contrary notwithstanding;- provided, that every such law or ordinance be so made in such manner and form, and subject to all such rules and regulations, as or shall be in force in reference to any other laws or ordinances of the local legislature of the said colony; and also provided, that no law or ordinance relating to, or affecting the administration of justice within the said colony or its dependencies shall take effect within the said colony, or shall have the force or authority of law there, until the same shall have been ratified and confirmed by us, our heirs, and successors, unless the same shall have been passed by the unanimous votes of the said legislative council; but in any case wherein any such unanimous votes of the members of the said legislature shall be given in favour of the immediate operation of any such law or ordinance as aforesaid, then, and in every such case, it is our further will and pleasure, that the same shall take effect within the said colony, and shall have the force and authority of law immediately from and after the date and enactment thereof; subject nevertheless to our right and authority to disallow the same, if in any such case we should be so advised: provided, always, that nothing in these presents contained, nor any act which shall be done under the authority hereof, shall extend, or be construed to extend, to prevent us, our heirs and successors, by any other letters patent to be by us or them from time to time for that purpose issued, under the great seal of the United Kingdom, from revoking these presents, or any part thereof, or from making such further or other provision for the administration of justice throughout the said colony and its dependencies at our and their will and pleasure as circumstances may require.

In witness whereof, we have caused these our letters to be made patent - Witness Ourselves, at Westminster, the 28th day of November, in the seventh year of our reign.

By Writ of Privy Seal,
(Signed) EDMUNDS.

ANNEXURE 2

The Average Period of Confinement for Prisoners Awaiting Trial, during the Period 1828-1833

Court where held.	No. of sessions yearly.	No. tried during the 6 years.	Of whom were committed.	Of whom were bailed.	No. confined for 100 days and upwards.	Proportion p.ct. of the number committed	Average period of confinement
Cape Town,	4	307	294	13	9	3 p.ct.	53.6 days
Graham's Town	2	230	184	46	123	66.8	141.9
Uitenhage	2	187	162	25	84	51.9	115.6
Somerset,	2	206	177	29	128	72.3	153.8
Graaff-Reinet,	2	261	241	20	147	61.0	157.1
Stellenbosch,	2	110	99	11	44	44.4	98.1
Worcester,	2	191	191	nil	104	54.5	122.7
George,	2	35	25	10	12	48.0	83.9
Swellendam,	2	82	64	18	38	59.4	127.2
Beaufort,	2	103	99	4	76	76.8	178.1
Clanwilliam,	2	47	47	nil	36	76.6	181.6
Total number tried		-	-	-	1760		
Of whom were bailed		-	-	-	175		
Committed		-	-	-	1585		

Average number of days each prisoner was confined before trial, (including the Quarter Session Cases in Cape Town and Cape Division,) 119.1 days; -Cape Town and Division excluded, 134,8 days.

ANNEXURE 3

TOTAL NUMBER of CIVIL CASES in the SUPREME and CIRCUIT COURTS of the Colony in each year, from 1828 to 1843 inclusive, showing the annual averages.

DISTRICT	Supreme	Circuit	Total	Annual average.
Cape,	7088	0	7088	443
Stellenbosch,	2718	610	3328	208
Clanwilliam,	80	0	0	0
Worcester,	422	0	0	0
Worcester & Clanwilliam,	502	150	652	41
Swellendam,	772	524	1296	81
George,	269	661	930	58
Uitenhage,	453	1388	1841	115
Albany,	562	3536	4098	256
Somerset,	0	0	0	0
Cradock,	0	0	0	0
Somerset & Cradock,	197	796	993	62
Graaff-Reinet,	0	0	0	0
Colesberg,	0	0	0	0
Graaff-Reinet & Colesberg,	158	650	808	50
Beaufort,	136	493	629	39
Total,	12855	8808	21663	1351

ANNEXURE 4

RETURN of CRIMINAL CASES indicted in the Circuit and Supreme Courts in each year,
from 1828 to 1844 inclusive.

	1828	1829	1830	1831	1832	1833	1834	1835	1836	1837	1838	1839	1840	1841	1842	1843	1844
First, . .	36	114	131	84	69	94	73	13	102	85	95	109	143	75	80	96	
Second, . .	87	102	121	126	95	108	121	135	107	125	182	102	115	77	101	132	
Circuit Total,	<u>123</u>	<u>216</u>	<u>252</u>	<u>210</u>	<u>164</u>	<u>202</u>	<u>194</u>	<u>148</u>	<u>209</u>	<u>210</u>	<u>277</u>	<u>211</u>	<u>258</u>	<u>152</u>	<u>181</u>	<u>228</u>	<u>184</u>
Supreme Court Total,	33	51	68	55	36	54	42	38	47	40	25	28	32	41	35	45	30
Grand Total,	<u>156</u>	<u>267</u>	<u>320</u>	<u>265</u>	<u>200</u>	<u>256</u>	<u>236</u>	<u>186</u>	<u>256</u>	<u>250</u>	<u>302</u>	<u>239</u>	<u>290</u>	<u>193</u>	<u>216</u>	<u>273</u>	<u>214</u>

ANNEXURE 5

NUMBER of CRIMINAL CASES indicted in the Supreme and Circuit Courts during the period from 1828 to 1843, both inclusive, distinguishing the crimes.

CRIMES	Supreme Court	Albany	Graaff-Reinet & Colesberg	Uitenhage	Worcester & Clanwilliam	Somerset & Cradock	Stellenbosch	Swellendam	Beaufort	George	Total
1. Treason,	0	0	0	1	0	0	0	0	0	0	1
2. Murder,	41	39	33	16	30	27	8	22	16	7	239
3. Culpable Homicide,	14	17	9	6	7	9	3	3	4	0	72
4. Administering Poison with intent to Murder,	1	0	0	0	0	0	0	0	0	0	1
5. Assault with intent to Murder,	25	20	9	14	6	8	4	5	1	4	96
6. Assault with intent to do some grievous bodily harm, or aggravated,	16	13	7	16	3	4	5	9	4	7	84
7. Robbery,	15	5	4	2	5	4	9	5	1	0	50
8. Assault with intent to commit Robbery,	1	1	0	0	0	0	0	0	0	0	2
9. Rape,	18	31	5	14	15	13	8	6	5	5	120
10. Assault with intent to commit Rape,	16	11	10	13	6	3	3	2	2	5	71
11. Indecency or Indecent Assault,	0	0	0	0	0	1	0	0	0	0	1
12. Sodomy,	2	1	2	0	0	4	0	1	0	3	13
13. Attempt to commit Sodomy,	0	0	0	0	2	0	0	0	0	1	3
14. Incest,	1	0	0	0	0	0	0	3	0	0	4

ANNEXURE 5 (contd.)

CRIMES	Supreme Court	Albany	Graaff- Reinet & Colesberg	Uiten- hage	Worcester & Clan- william	Somer- set & Cradock	Stellen- bosch	Swell- endam	Beau- fort	George	Total
15. Bigamy,	0	0	0	0	0	0	0	1	0	0	1
16. Perjury,	8	6	3	2	2	3	1	3	0	0	28
17. Subornation of Perjury & Conspiracy,	0	0	0	0	0	0	0	0	0	1	1
18. Piracy,	1	0	0	0	0	0	0	0	0	0	1
19. Arson,	4	5	2	2	5	2	7	0	1	2	30
20. Attempt to commit Arson,	0	1	0	0	0	0	0	0	0	0	1
21. Malicious Injury to Property,	1	2	0	1	0	1	0	0	0	0	5
22. Fraud,	10	12	4	4	0	0	1	2	1	0	34
23. Fraudulent Insolvency,	5	0	1	0	1	1	1	0	0	0	9
24. Forgery,	6	5	0	0	2	1	1	0	0	2	17
25. Uttering a Forged Instrument,	0	0	0	0	0	0	1	0	0	0	1
26. Coining False Money,	3	0	0	0	0	0	0	0	0	0	3
27. Uttering False Money,	1	0	0	0	0	0	0	0	0	0	1
28. Returning from Banishment,	2	0	0	0	0	0	0	0	0	0	2
29. Rescuing a Prisoner,	0	0	0	0	0	0	0	0	0	2	2
30. Conveying Instrument of escape to Prisoner under sentence of death,	1	0	0	0	0	0	0	0	0	0	1

ANNEXURE 5 (contd.)

CRIMES	Supreme Court	Albany	Graaff- Reinet & Colesberg	Uiten- hage	Worcester & Clan- william	Somer- set & Cradock	Stellen- bosch	Swell- endam	Beau- fort	George	Total
31. Wilfully allowing a Convict to escape,	0	0	0	0	0	1	0	0	0	0	1
32. Housebreaking with intent to commit violence,	0	0	0	0	0	0	0	0	0	1	1
33. Housebreaking and Theft,	123	86	78	76	67	40	83	44	16	25	638
34. Theft, including receiving stolen goods,	335	409	362	240	206	270	98	116	116	48	2200
35. Assault,	16	13	7	15	2	4	4	9	4	7	81
36. Sending a challenge to fight a duel,	1	0	0	0	0	0	0	0	0	0	1
37. Violence to a Magistrate,		0	0	0	1	0	0	0	0	0	1
38. Contravening Ordinance 19th June 1826,	0	0	1	3	2	0	6	2	7	0	21
39. Contravening Order of King in Council,	2	2	11	7	10	13	9	11	0	1	66
40. Contravening Ordinance No. 12 1836,	1	0	0	0	0	0	0	0	0	0	1

CHAPTER 5

5. GROWING PAINS

5.1. INTRODUCTION

During the period 1846-1865 the composition of the Cape Supreme Court Bench underwent a number of important changes. Judge Menzies died in harness at Colesberg in 1850. William Musgrave, who had been appointed to the Bench in 1843, succeeded Menzies as the first puisne judge. Sydney Smith Bell was appointed second puisne judge in 1851. Judge Bell succeeded Musgrave as first puisne on the latter's death in 1854, and John Watts Ebdon was appointed second puisne judge. Sir John Wylde retired in 1855 and Judge Ebdon was obliged to take sick leave. Egidius Benedictus Watermeyer was appointed to act in the place of Ebdon and Hendrik Cloete was recalled from Natal, in order to fill the newly created post of third puisne judge.¹ The post of Chief Justice remained vacant until 1857, when Bell was appointed to act as such. Hendrik Cloete was made first puisne and Watermeyer's appointment was confirmed as a result of Ebdon's retirement. In 1858 Bell was obliged to step down when Sir William Hodges was appointed Chief Justice. Until 1865, the Bench consisted of Sir William Hodges, Sydney Smith Bell, Hendrik Cloete and Egidius Benedictus Watermeyer.

1. Act No. 10 of 1855.

Only two immediate changes were introduced as a result of the inquiry into the judicial establishment. In future, the rules of court had to be confirmed by an Ordinance of the Legislative Council, and the system of impressment for the transport of the circuit judges was terminated. The more important changes were only introduced after the colony received representative government in 1853. The judges were also destined to play both a direct and an indirect role in the achievement of representative government. By refusing to give evidence before the Robben Island Committee, they had exposed the weakness of the Legislative Council. During the crisis which arose out of the Home government's attempt to settle convicts at the Cape, the Chief Justice had advised the Governor that he could not constitutionally send the convict ship away. The advice was heeded by the Governor, and it almost led to civil war. This in turn, contributed towards the granting of representative government. In the case of Letterstedt v. Morgan and Others,² which arose out of the anti-convict agitation, public confidence in the judiciary was shattered by the unseemly conduct of the judges. The judges played a more positive role in assisting with the formulation of the draft constitution. In this respect, Sir John Wylde was instrumental in promoting the principle of an elective Upper House. He was rewarded by being appointed to the Presidency of the Legislative Council in the new Parliament.

2. (1849) 5 Searle 373.

During the first sitting of the new Parliament, trial by jury was extended to civil cases.³ However attempts to secure a separate superior court in the Eastern districts met with no success. Instead, a substitute Bill, which provided for the appointment of a third puisne judge, was carried in 1855.⁴ Owing to financial consideration, the appointment was only filled in 1858. In 1858 the Supreme Court was given control over the admission of notaries and conveyancers,⁵ and it became possible for aspirant advocates to qualify locally.⁶ Finally in 1864, the Eastern Cape separatists succeeded in obtaining a resident superior court at Grahamstown.⁷

Many of the unresolved problems, which were raised during the inquiry into the judicial establishment, received attention. The borders of the colony were extended as a result of the Frontier wars, and this resulted in an even greater strain being placed on the already overburdened circuits. The judges were requested to submit plans for the resolution of the difficulties. However the Governor disregarded their advice, and he attempted to solve the problem by introducing an additional circuit in 1859. This proved to be unworkable and half-yearly circuits were re-introduced in 1860. The conduct of circuit court prosecutions was investigated and the office of clerk of the peace was considered. Although the office of clerk of the peace was retained, circuit prosecutions were increasingly conducted by the advocates. The estab-

3. Act No. 7 of 1854.

4. Act No. 10 of 1855.

5. Act No. 12 of 1858.

6. Act No. 4 of 1858.

7. Act. No. 21 of 1864.

lishment of the Eastern Districts Court in 1864, and the improvement of circuit transportation, did much to relieve the pressures.

The office of the sheriff and the service of the court process also received attention during this period. In 1856 an action for damages was brought against the sheriff, as the result of the negligence of one of his deputies.⁸ The court found for the plaintiff and the sheriff was suspended. The sheriff's duties were entrusted to the master and the two offices were combined. Although the judges approved the combination of the two offices as a temporary measure, they were opposed to it as a permanent arrangement. In 1860 a Select Committee investigated the matter and, as a result, the sheriff's office was separated from that of the master in 1861.

5.2. RULES OF COURT

Although the local legislature was thwarted in its attempt to break up the Supreme Court, it decided to exercise greater control over the judges' authority to establish the rules of court. It was therefore necessary to amend section 46 of the Charter of Justice, which had empowered the judges with the authority to regulate the business of the Supreme and circuit courts. In 1846 an amending Ordinance was promulgated, which provided that all future rules had to be enacted by Ordinance before they

8. Heugh and Fleming v. The High Sheriff (1856) 2 Searle 280.

could take effect.⁹ The Ordinance further provided that the Legislative Council could itself, initiate, alter, amend or revoke any such rule order or regulation pertaining to the business of the Supreme and circuit courts.¹⁰ In future, the judges could no longer be regarded as the 'supreme masters' in matters governing the business of the courts.

After the advent of representative government in 1853, the Ordinance which provided for the regulation of the rules of court, was again amended. On 4 June 1856 an Act was promulgated, which reaffirmed the judges' authority to frame rules in terms of section 46 of the Charter of Justice.¹¹ The judges were now required to place the rules before the Governor for approval or disallowance.¹² After the rules had been approved by the Governor, who was required to act on the advice of the Executive Council, they had to be promulgated in the Government Gazette before they could come into force and take effect.¹³ After proclamation, the rules had to be tabled in Parliament. If they were not confirmed by an Act, during the session in which they had been laid before both Houses, they were to cease to have any force or effect.¹⁴

5.3. ON AND OFF THE BENCH

In 1849 a remarkable episode took place in the Supreme

9. Ordinance No. 32 of 1846.

10. Section 3.

11. Act No. 26 of 1856.

12. Section 2.

13. Section 3.

14. Section 4.

Court, when the judges assembled to hear the case of Letterstedt v. Morgan and Others.¹⁵ The case had its origin in the activities of the Anti-convict Association, which had been formed for the purpose of opposing the settlement of convicts at the Cape. The defendants, who were members of the association, had instituted a boycott against the plaintiff, who was a well known merchant. The plaintiff then instituted an action for damages against the members of the association. When the case came on for trial before Sir John Wylde, William Menzies and William Musgrave, the defendants requested the Chief Justice and Judge Menzies to recuse themselves, on the grounds that they had given extra-judicial opinions to the Governor on the subject matter of the case. The two judges insisted on hearing the case, whereupon Judge Musgrave indicated that he would leave the court. A press report of what transpired at the hearing stated that;¹⁶

'The astonished citizens saw their Supreme court made a theatre, in which the worst passions were openly exhibited. They saw the hall of justice converted into a forum, and the judges addressing harangues to the wondering public. They saw two of the three exalted functionaries overwhelming the third with covert sneers and open insults, browbeating their audience, rating their venerable registrar like a lackey, by turns wheeling and defying the public and the press, and making altogether a most deplorable scene, which had brought the whole judicial system of the colony into complete discredit.'

15. (1849) 5 Searle 373.

16. F. St. Leger, Mr. Justice William Musgrave, South African Law Journal, vol.54, 1937, p.284.

After disposing of the application for their recusal, the judges proceeded to try the case. However the plaintiff withdrew his action and the matter was laid to rest.

Time was unfortunately running out for the pioneering judges, and within six years, the composition of the Bench was completely changed. Judge Menzies died in harness at Colesberg on 1 November 1850. His death had a sequel in the case of R v. Van Reenen and Others.¹⁷ Before the news of Menzies' death had reached Cape Town, the Chief Justice convicted Van Reenen and his co-accused and sentenced them to terms of imprisonment. The prisoners subsequently petitioned to have their convictions set aside, on the grounds that the court was not properly constituted because of Menzies' death. However the court held that the death of one of the judges did not invalidate judicial acts which had been performed by the other judges in ignorance of the fact and before any notice of it had reached them. It was however necessary to appoint an acting judge in order to fill the hiatus, and Thomas Henry Bowles, the registrar of the Supreme Court, was hastily elevated to the Bench. During his short tenure as an acting judge, Bowles was reputed to have inaugurated the practice of pronouncing the two word judgment, 'I concur'.¹⁸ Sydney Smith Bell was appointed to the Bench on 9 June 1851, and Bowles descended again to his seat in the well of the court. In September 1854 Judge Musgrave's health gave in while he was conduc-

17. (1850) 1 Searle 8.

18. F. St. Leger, The Honourable Sir Sydney Smith Bell, South African Law Journal, vol.50, 1933, p.437.

ting the half-yearly circuit. He returned to Cape Town, 'suffering from fatigue and exposure'.¹⁹ Bell left to complete the circuit and the conscientious Musgrave resumed his duties. However on 6 October 1854, the Chief Justice was informed that there was no quorum as Musgrave had died at 8.30 that morning.²⁰ On the following day John Watts Ebdon was appointed to the Bench, and Bell succeeded Musgrave as first puisne. On 8 June 1855 an Act was passed, which provided for the appointment of a third judge.²¹ However before an appointment could be made, Sir John Wylde suffered a stroke while delivering a judgment in his capacity as judge of the Vice-Admiralty Court.²² After recording his judgment, he had to be carried from the court. This was to be his last appearance on the Cape Bench after twenty-seven years of continuous service. After being granted a pension, he retired in October 1855. Matters were further complicated when Judge Ebdon was obliged to retire on sick leave in October 1855.

Egidius Benedictus Watermeyer was appointed to act in Ebdon's absence. Thus instead of the intended Bench of four judges, the court was reduced to Bell and Watermeyer. Fortunately, the Better Administration of Justice Act, which had been passed in June, anticipated the emergency. Section 6 provided that;²³

'So long as the number of judges of the Supreme Court, for the time being, shall not be less than two, the court shall be competent to execute all and every powers, jurisdictions and authorities belonging to or vested in the said court.'

19. St. Leger, *loc.cit.*, p.291.

20. St. Leger, *loc.cit.*

21. Act No. 10 of 1855.

22. F. St. Leger, Sir John Wylde, South African Law Journal, vol.50, 1933, p.295.

23. Act No. 10 of 1855.

On 14 December 1855 the Bench was restored to three judges when Hendrik Cloete was transferred from Natal. However, owing to financial considerations, the post of Chief Justice remained vacant. On 31 March 1856 Bell was requested to appear before the Finance Committee of the House of Assembly. He was asked whether there were any reasons why the salary of the Chief Justice should differ greatly from that of the puisne judges.²⁴ Bell pointed out that it was necessary to pay the Chief Justice a higher salary, in order to 'tempt' a suitably qualified candidate, and he stated that the Chief Justice had to perform duties 'over and above the judicial duties'.²⁵ He concluded his evidence with the following remark;²⁶

'It would seem to me that the colony would gain more than the difference in money is worth from an officer who, as Chief Justice, lived in the style and dignity becoming his position.'

In a letter which he later sent to the Committee, Bell stated that throughout the Empire, a difference in rank and salary existed between the heads of the courts and the puisne judges.²⁷ He pointed out that in Scotland, the judges received three fifths of the salaries of the chiefs. In England, in the common law courts, they received five eighths, and in India five sixths. He further pointed out that at the Cape, the judges received three fifths of the salary of the Chief Justice and although the ratio was the same as that of Scotland, the Scottish judges received an annual salary of £3000. The Finance Committee decided to heed Bell's advice, and he

24. Cape of Good Hope Parliamentary Papers, Select Committee Reports, 1856.

25. Select Committee Reports, loc.cit.

26. Select Committee Reports, loc.cit.

27. Select Committee Reports, loc.cit.

was appointed acting Chief Justice,²⁸ while a suitable candidate was sought in England.

In 1858 Sir William Hodges was selected as the new Chief Justice, and Judge Bell had to resume his seat as first puisne. Judge Cloete was appointed second puisne, and Judge Watermeyer was permanently appointed as third puisne. It was necessary to pass a special Act to secure the salary of the third puisne judge,²⁹ and on 14 August 1861 an Act was passed for purposes of providing the judges with a pension on retirement.³⁰ Prior to the passing of the latter Act, the judges were not entitled to receive a pension as a right. In terms of the Pension Act, a judge was now entitled to receive a pension after having served on the Bench for a period of ten years. The amount payable would be equal to one half of the salary that had been paid to the judge, for the three years period immediately preceding his retirement. If the judge had served for a period of fifteen years or upwards, he would be entitled to receive two thirds of his salary, and if he had served for a period of twenty years, he would be entitled to receive a pension equal to his full salary. The Act further provided that no pension would be payable to a judge if he retired before reaching the age of sixty, unless he had become disabled. The Act also made special provision for the period of service which had been performed by Hendrik Cloete during his stay in Natal.

28. On 13 November 1857.

29. Act No. 13 of 1861.

30. Act No. 14 of 1861.

On 26 July 1864 the Bench was enlarged to five judges.³¹ This was necessary in order to provide for the establishment of the Eastern Districts Court. On 27 September Sir William Hodges travelled to England on leave, and Bell was again appointed acting Chief Justice in his absence.

5.4. THE ROLE OF THE JUDICIARY IN THE ESTABLISHMENT OF REPRESENTATIVE GOVERNMENT

5.4.1. INTRODUCTION

The judges were destined to play a distinct role in the movement which led to the granting of representative government at the Cape in 1853. Movement was already afoot in 1841, when meetings were held at Cape Town and Grahamstown with the view to petitioning the Crown for some form of representative assembly. However the Secretary for Colonies felt that the prevailing conditions did not warrant any major constitutional changes.³² In 1842 the judges had stimulated the movement by exposing the impotence of the Legislative Council. They had, in fact, 'played into the hands of the extreme reformers, and the press took up the cry for the abolition of the Council with renewed vigour'.³³ In 1846 the weakness of the Council was again exposed to the public view when the Secretary for Colonies thwarted its plans to decentralize the Supreme Court. Consequently, when the Secretary for Colonies requested the Governor to obtain the views of

31. Act No. 21 of 1864.

32. *British Parliamentary Papers*, vol.38 (1137), p.3.

33. *Ralph Kilpin, The Romance of a Colonial Parliament*, London : Longmans Green, 1930, p.67.

the government on the prospects of a representative legislature, the response was overwhelmingly in favour of such a measure. The movement gained added impetus during the anti-convict agitation of 1849. Acting on the advice of the Chief Justice, the Governor refused to order the convict ship to leave the Cape, until he had received instructions from the Secretary for Colonies. This action almost led to civil war, and in order to hasten the grant of a representative legislature, 'the Anti-Convict Association attempted to exterminate the Legislative Council'.³⁴

In the meantime, the Governor had taken the initiative and had directed the Attorney-General to prepare a memorandum on the subject of representative government. Copies of the memorandum were circulated to the members of the Executive Council and the judges for their advice and comment. The Attorney-General was requested to peruse the opinions and to frame a working plan for a system of representative government at the Cape. The task was completed in June 1848, and the Governor forwarded the plan, together with the opinions and the underlying correspondence, to the Secretary for Colonies. In a covering letter the Governor stated that the constitution of Canada had formed the basis of the proposals.³⁵ The plan provided for a parliament which was to consist of a nominated Legislative Council and a representative House of Assembly.

34. Kilpin, *op.cit.*, p.72.

35. British Parliamentary Papers, *loc.cit.*, p.4.

5.4.2. THE JUDGES' CONTRIBUTION

All three judges delivered an opinion on the proposed system of representative government. In this respect, Sir John Wylde was responsible for making a major contribution to the constitutional development at the Cape. His suggestion that the upper house should be an elective rather than a nominative body was eventually incorporated into the constitution. An examination of the individual opinions of the judges provides an interesting insight into their attitudes towards the proposed extra-judicial developments which were taking place in the colony at the time.

5.4.2.1. SIR JOHN WYLDE'S PROPOSALS³⁶

Sir John Wylde was of the opinion that constitutional change was essential in order to engender respect and confidence in the legislative institution of the colony. He had no doubt that the inhabitants were competent to shoulder representative government, as there was a sufficiency in population, revenue, commerce and general public interest. He brushed aside the supposed obstructions by pointing out that 'a partial and oppressive legislature could not legally exercise any prejudicial domination over any particular class', because the authority of the Governor and the Home government would put an 'effective stop to any such obnoxious measure'.³⁷

36. British Parliamentary Papers, loc.cit., p.40-46.

37. British Parliamentary Papers, loc.cit., p.41.

He was opposed to any plan which provided for the extension of the Legislative Council, on the grounds that the members did not enjoy the public confidence. Furthermore he considered their services to be inefficient. In his opinion, the interests of the Crown required more than the authority of the Governor, when brought into balance with the interests of the inhabitants. He felt that this balance could only be achieved through the medium of a second legislative chamber.

He was opposed to the creation of a separate and distinct legislature for the Eastern districts of the colony, and stated that a single legislative body would help to unify the interests of the colony as a whole. He disposed of the possibility of racial prejudice by pointing out that the jury lists had been opened to the Coloured population 'without demur or remonstrance'.³⁸ He stated that a modest property qualification would 'admit that class on perfect equality, at least, with every other, while more could not justly be claimed or conceded to the legislative vote'.³⁹

He was in general agreement with the plan which had been drafted by the Attorney-General. However he was in favour of an increased property qualification for the voters.⁴⁰ On the other hand, he felt that the property qualifications of the members of the assembly should be reduced so as to afford a fuller selection of competent persons to

38. British Parliamentary Papers, loc.cit., p.44.

39. British Parliamentary Papers, loc.cit.

40. He favoured increasing the value of the proposed annual leasehold qualification from £15 to £20.

the assembly.⁴¹ He was also in favour of appointing government officials to the assembly. In this respect, he considered the services of the Attorney-General to be indispensable.

He was opposed to a nominated upper house, and he stated that unless unofficial members were admitted, 'it would stand degraded at once'.⁴² He suggested that the majority of the members should be elected by popular vote. He proposed that the property qualifications for election to the upper house should be double the amount required for election to the assembly. He was convinced that membership of an elective upper house would be looked upon as 'a distinction in rank and public consideration', and he stated that it would induce persons to come forward for public service, 'who now would be wholly adverse to any share in its dispensation'.⁴³ He concluded by confidently stating that 'little or no difficulty would attend the proposed legislative system as to prescribed or actual local management and arrangement'.⁴⁴

5.4.2.2. JUDGE MENZIES' PROPOSALS⁴⁵

Judge Menzies stated that the Legislative Council had 'neither worked well nor produced any benefits or advantages which could make its abolition a matter of regret'.⁴⁶ He therefore felt that it was imperative to introduce some form of representative government at the Cape. In his

41. He favoured a reduction from £1000 to £500.

42. British Parliamentary Papers, loc.cit., p.45.

43. British Parliamentary Papers, loc.cit., p.46.

44. British Parliamentary Papers, loc.cit.

45. British Parliamentary Papers, loc.cit., p.29-39.

46. British Parliamentary Papers, loc.cit., p.29.

opinion, the colony contained a sufficient number of inhabitants for purposes of forming a properly qualified constituency, which would be representative of all the different interests of the community. He pointed out, however, that;⁴⁷

'The People of colour would nowhere themselves return a representative; and that, except in Cape Town, or perhaps in the towns of Uitenhage or Graaff-Reinet, where in the event of a close run contest, the people of colour, particularly the Malays, if they banded together, might turn the scale, they would exercise very little influence in the return of any member of the legislature.'

He stated that persons of mixed race could be prejudiced when 'the interests of the white population, as a class, were opposed to and brought into collision with that of the coloured population as a distinct class'.⁴⁸ He therefore recommended that some statutory provision should be introduced which would prevent the colonial legislature from oppressing the coloured population as a class.

He was opposed to the creation of a separate and distinct legislature for the Eastern districts of the colony, and he favoured one legislature for the whole colony with its seat at Cape Town. He recommended that the following restrictions should be imposed on the proposed legislature :⁴⁹

1. The fixed expenditure should continue to be payable, until changed with the consent and on the suggestion of the Governor. All other expenditure should be voted annually.

47. British Parliamentary Papers, loc.cit., p.31.

48. British Parliamentary Papers, loc.cit.

49. British Parliamentary Papers, loc.cit., p.33

2. It should not be lawful for either of the two houses to originate or pass any vote, resolution, or Bill for the appropriation of the funds set apart as a civil list, or any tax to any purpose, which had not first been recommended by a message of the Governor.
3. Some restriction should be placed on Bills containing provisions relating to the enjoyment or exercise of any form or mode of religious worship, or which imposed or created any penalties, burdens, disabilities, or disqualifications in respect of the same.
4. The colonial legislature should be restricted from having it in their power to pass any Ordinance containing any provision repugnant or inconsistent with the Charter by which that legislature was constituted; or any order made by the Privy Council, or any Act of Parliament extending to or in force in the colony, or whereby persons not being of european birth or descent might be subject or made liable; and that any Ordinance repugnant to or inconsistent with these provisions which might be passed, should be absolutely null and void to all intents and purposes.
5. Neither of the houses should have it in their power to control the appointments to, or suspension or dismissal from, public office.

Menzies felt that with the abovementioned restrictions, the power of legislation might be safely entrusted to the proposed legislative council and house of assembly, or to a single legislative council. In his opinion, no person holding office under the government should be eligible for election as a representative. He was con-

vinced that it would be impossible to induce properly qualified persons to take up office in the proposed legislative council, if the majority of the members consisted of nominated officials. He suggested that the number of official members be limited to five, and the unofficial nominees to not less than ten.

Menzies stated that the benefits of a representative form of government could be immediately conferred on the colony by the establishment of a single legislative body.⁵⁰ He proposed that it should be composed of twenty elected members and ten nominated members. He suggested that at least five or six of the nominated members should be persons holding office under the government. He was of the opinion that under this system, unofficial nominees would more readily accept nomination to the council. He concluded by stating that;⁵¹

'From a Legislative Council, constituted in the manner which has just been proposed, nothing can be so easy as to advance to a House of Assembly with a separate Legislative Council, whenever the experience derived from the mode of working and proceedings of the proposed Council shall show that the colony can furnish thirty-six members of a House of Assembly, who will really and substantially represent the interests of the inhabitants by whom they are elected; and ten unofficial members, possessing the requisites necessary to qualify them to be members of a separate Legislative Council, nominated by the executive government.'

50. British Parliamentary Papers, loc.cit., p.38.

51. British Parliamentary Papers, loc.cit., p.39.

5.4.2.3. JUDGE MUSGRAVE'S PROPOSALS⁵²

Judge Musgrave considered the proposed measure to be a 'very bold experiment'. However, under the existing circumstances, he did not see how it could be avoided. In his opinion, the plan, which had been drafted by the Attorney-General, was imperfect. He felt that it could only be considered as a first step towards the attainment of a 'very desirable object'.⁵³ He stated that it was a step which had to be taken with extreme caution;⁵⁴

'Because it is one which would infallibly lead either to great practical good, or to some irreparable mischief, and could not be retraced if it should unfortunately happen to fail.'

He was not, however, prepared to state which of the two results was more probable. He was opposed to the creation of a distinct and separate legislature for the Eastern districts of the colony. Owing to the peculiarity in the character and condition of the colony, he deemed it unadvisable to introduce anything beyond a simple form of representative government. He was in favour of a legislature consisting of two houses. He anticipated that the appointments to the upper house would be made 'with a view to preserving a preponderating influence on the part of the local government'.⁵⁵

In his opinion, the interests of the coloured classes of the population could never be in any serious danger of

52. British Parliamentary Papers, loc.cit., p.39-40.

53. British Parliamentary Papers, loc.cit., p.40.

54. British Parliamentary Papers, loc.cit.

55. British Parliamentary Papers, loc.cit.

being disregarded, while the Crown maintained a legitimate influence in the deliberations of the two houses, and while it retained its power of withholding its assent from their enactments. He stressed the need to strictly define the powers of the legislature so as to guard against collisions. He concluded by suggesting that;⁵⁶

'As the lower house would, as a popular body, require a good deal of tact, address and temper in the management of it, it would seem to be desirable that the Law Officer of the Crown and the Treasurer-General should have seats in it.'

5.4.3. THE ESTABLISHMENT OF REPRESENTATIVE GOVERNMENT

On 12 February 1849 the Secretary for Colonies informed the Governor that he had advised the Sovereign to grant the colony representative government.⁵⁷ On 31 January 1850 the Privy Council's report on the practical aspects involved in implementing the new dispensation were transmitted to the Cape. The report was followed by letters patent which had been granted on 23 May 1850.⁵⁸ The letters patent were based on the Attorney-General's plan and were eventually to form the foundation of the new constitution. Local details were filled in by the members of the Legislative Council, and the draft constitution was returned to the Secretary for Colonies in September 1850. After much travail, caused largely by the intransigence of the Eastern Cape separatists, the Constitutional Ordinance was confirmed by the Privy Council on

56. British Parliamentary Papers, loc.cit.

57. British Parliamentary Papers, loc.cit., p.99.

58. Statutes of the Cape of Good Hope 1652-1895, Cape Town, 1895, vol.1, p.491.

11 March 1853.⁵⁹ The constitution made provision for a Parliament, which was to consist of the Governor, an elective Legislative Council of fifteen members and a forty-six seat House of Assembly. The four principal government officials had the right to speak in both Houses, but were precluded from voting. The franchise qualification was fixed at a lower qualification than that recommended by the Legislative Council, because the British government was not desirous of excluding 'the coloured classes who in point of intelligence are qualified for the exercise of political power'.⁶⁰ Appropriation Bills had to be introduced by the Governor, who had to summon Parliament once a year. As a concession to the Eastern members, no seat was fixed for the sittings.⁶¹ The Governor was vested with the authority to recommend laws or changes in Bills presented to him for assent. He had the power to reserve Bills, which would lapse within two years if not assented to. The Crown also reserved the right to disallow any Act within two years of its promulgation.

The Chief Justice was appointed President of the Legislative Council, with full powers to participate in the deliberations. Sir John Wylde's past conduct in the Council of Advice had been forgiven, and the Crown deemed it fitting that he should preside in;⁶²

'The first colonial Upper House in which all the members were elected; it was the one and only colonial Upper House ever given the right to increase as well as to decrease taxation; and it was the

59. Statutes of the Cape of Good Hope 1854-1858, Cape Town : Saul Solomon, 1863, p.1.

60. H.R.Hahlo and Ellison Kahn, South Africa : The Development of its Laws and Constitution, London : Stevens; South Africa : Juta, 1960, p.54.

61. Parliament held one sitting at Grahamstown in 1864.

62. Kilpin, op.cit., p.85.

only colonial Upper House to share with the Lower House the novel advantage of permitting members to sit and speak without being elected.'

The new Parliament, which met for the first time in July 1854, lost no time in tackling the problems which had been left unresolved by the abortive judicial inquiry of 1845. The extension of jury trials to civil cases was one of the first matters to receive attention.

5.5. THE EXTENSION OF TRIAL BY JURY TO CIVIL CASES⁶³

5.5.1. INTRODUCTION

Events leading up to the extension of trial by jury to civil cases can be traced back to the recommendations of the Commission of Inquiry of 1823. The Commissioners were in favour of introducing juries for the trial of civil matters, but recommended that the measure should initially be restricted to Cape Town and the Albany district. They proposed that the juries should be composed of nine men, and that decisions should be carried by a majority of not less than six. According to their proposal, the consent of both parties would be required. They were opposed to juries trying civil cases involving freedom, civil rights or the property of Slaves and Khoi-khoi.

The British government accepted the recommendation and provision was made in the Charter of Justice for the extension of trial by jury to civil cases.⁶⁴

63. Introduced by Act No. 7 of 1854.

64. Section 48.

Although the local legislature was authorized to pass the necessary laws, the Secretary for Colonies advised the Governor to exercise caution before proceeding with the measures.⁶⁵ In 1831 the Governor raised some doubt as to whether juries should be allowed to try civil cases. In a confidential letter to the Secretary for Colonies, he stated that;⁶⁶

'The result of some recent trials in cases of maltreatment of slaves, where the prisoners were acquitted in the teeth of the clearest evidence against them, makes it very questionable if the trial by jury in criminal cases has been a benefit to the colony. But, whatever difference of opinion there may be as it respects the criminal law, I believe that few persons, who are not carried away by the popular feeling of enlightenment upon the subject, would consider the extension of it to civil cases as a blessing or likely to establish a purer system of justice here.'

5.5.2. THE COMMITTEE OF INQUIRY INTO THE JUDICIAL ESTABLISHMENT

The question as to whether trial by jury should be extended to civil cases was taken up by the Committee of Inquiry in 1845. Sir John Wylde was in favour of the extension as he felt that it would further the assimilation of the local laws to that of England.⁶⁷ However he felt that the trial of civil cases by juries should be optional, because;⁶⁸

'To enforce the jury system in all suits of the court would be to diminish, in some cases, the facility of legal satisfaction by an increased necessary expense upon the suitor. To deny it in all is to debar suit-

65. Theal, Cape Colony Records, vol.32, p.253. Letter dated 5 August 1827.

66. G.H. 23/9. Letter dated 18 April 1831.

67. Report from the Committee of the Legislative Council on the Judicial Establishment, Cape Town : Saul Solomon, 1845, p.26.

68. Report, loc.cit.

ors from the advantage, certainly, which in many cases might be found in the commercial or particular knowledge of the jury.'

He favoured the introduction of jury trials on an optional basis at Cape Town and Grahamstown.

Judge Musgrave was opposed to the extension on the ground that 'it would be exceedingly embarrassing in the administration of the Roman Dutch Law'.⁶⁹ He considered it to be impractical in view of the unified nature of the legal system which combined both law and equity. However he conceded that there were commercial matters in which it might be desirable for the court to grant a special jury.

Judge Menzies was firmly opposed to the extension of trial by jury to civil cases. He explained that;⁷⁰

'If trial by jury is to be introduced in this colony to a similar extent to that which exists in England, we must take the whole of the English system connected with trial by jury or we shall be introducing an entirely new system, of the working or effects of which, we can derive no experience from the Law of England. I do not think that trial by jury, to the extent it exists in England, could be introduced advantageously without having as exact and perfect a system of pleadings, as that which exists in England to separate the issues of fact from those of law; and I am of the opinion that, in the present circumstances of the colony, such an exact and perfect system of pleading is unattainable.'

69. Report, loc.cit., p.33.

70. Report, loc.cit., p.99.

He pointed out that the members of the Cape Town community were intimately acquainted with every transaction of importance, and stated that they were 'so connected by family connection and relationship, that it would be difficult to find an impartial jury or one which had not pre-judged the case.'⁷¹

The members of the Committee were divided over the issue. The majority favoured the extension of trial by jury to civil cases throughout the colony. The minority recommended that it should only be introduced in the Supreme Court at Cape Town. When the reports were debated by the members of the Legislative Council, the Chairman of the Committee proposed the following;⁷²

'That the Council approves the adoption of trial by jury as to issues of fact in civil cases in all courts where trial by jury now obtains. That it be left to the option of either of the litigants to apply for a common or special jury, or neither, as it may best consist with his interests, and that in all cases brought before such a jury in which the aggrieved party seeks redress by pecuniary reparation, it shall belong to the jury to assess the damages.'

In his response the Attorney-General quoted the Secretary for Colonies, who had stated that civil jury trials should only be introduced 'after the most mature deliberation of the judges'.⁷³ He argued that the judges ought to be recognized as 'high authority', and stated the following;⁷⁴

71. Report, loc.cit.

72. Addenda to the Report and Evidence of the Committee of the Legislative Council on the Judicial Establishment, Cape Town : Saul Solomon, 1846, p.18.

73. Theal, loc.cit.

74. Addenda to the Report, loc.cit., p.34.

'I do not, indeed, counsel you, in regard to this or any other question, to put yourself supinely into the hands of the judges or to surrender your right of deciding for yourselves...But I counsel you to pay a most respectful attention to the views of the judges regarding the matters now in hand.'

However the majority of the members did not have the same high regard for the opinions of the judges, and the Chairman's proposal was accepted.

5.5.3. REACTION FROM THE SECRETARY FOR COLONIES

The Secretary for Colonies reacted by directing that a complete set of rules had to be established before trial by jury could be extended to civil cases.⁷⁵ He also pointed out that the jury lists had to contain a sufficient number of competent persons 'to afford the means of forming a panel of impartial men for the trial of each successive issue'.⁷⁶ He did not think that it would be possible to secure a sufficient number of competent men to serve as jurors in the country districts. He pointed out that in the country districts the jurors would be called upon to adjudicate on controversies between their personal friends or personal antagonists. He expressed doubt as to whether the population of Cape Town was large enough to furnish a sufficiently large and impartial jury list. He was not, however, opposed to the extension of trial by jury to civil cases in the Supreme Court at Cape Town. He suggested that it could be introduced as an

75. G.H. 1/180. Letter dated 4 December 1846.

76. loc.cit.

experiment if the public opinion demanded it. However he stated that preparation would first have to be made for establishing a system of written litigation, which would 'confine the jury to their proper provinces' and which would 'exclude from their consideration all questions not properly belonging to them'.⁷⁷

5.5.4. THE INTRODUCTION OF JURIES FOR THE TRIAL OF CIVIL CASES

The matter was shelved until the colony was granted representative government. However one of the first Bills to be introduced in the new Parliament provided for the extension of trial by jury to civil cases. The Bill was unanimously passed by both Houses and it entered the Statute book as Act No.7 of 1854. The Attorney-General, whose task it had been to draft the Bill, commented with some satisfaction that it had been framed 'in such a manner as to deserve some degree, the support which it received'.⁷⁸

The Act limited jury trials to civil actions in the Supreme Court.⁷⁹ Provisional cases, motions, interdicts and civil cases set down for trial by default were specifically excluded. In addition, the parties could consent in writing to have their cases tried without a jury. In all cases, questions of law were reserved for the determination of the court. The Act provided for questions

77. loc.cit.

78. J.R.Putzel, William Porter and Constitutional Issues at the Cape 1839-1875, Unp. M.A. thesis, UCT, 1942, p.135.

79. Section 1.

of fact to be tried before a judge and a jury of nine men.⁸⁰ The factual issues had to be settled before a judge in chambers. Where questions of fact were mixed with law, the facts had to be separated if possible. Where damages were claimed, the quantum had to be assessed by the jury. Issues which had been settled by the judge in chambers could be reviewed or referred to the Supreme Court.

Thirty-six jurors had to be summoned for the trial, all of whom had to reside within the municipality of Cape Town or within ten miles of the municipal boundaries. Each party to the action had the right to strike off the names of nine jurors from the list. Six of the nine jurors had to agree in order to pronounce a verdict.⁸¹ However all nine had to concur if the jurors had been in deliberation upon their verdict for less than an hour. The verdict could be either general or special. Each juror had to be paid ten shillings upon the delivery of a verdict, provided that, if the trial was adjourned to a second day, the presiding judge could allow an additional sum not exceeding ten shillings for each day during which the trial continued. The attorney who had set the matter down for trial was personally responsible for the payment of the juror's fees. However the amount was recoverable as part of the costs.

Any party to a case which had been tried by a jury, and who was dissatisfied with the findings, could apply on

80. Section 2.

81. Section 26.

motion to the Supreme Court to grant a new trial on the following grounds :⁸²

1. That the findings were contrary to the evidence.
2. That the judge had misdirected himself in a matter of law.
3. That there was an undue admission or rejection of evidence.
4. That the damages were excessive.
5. That there was a '*res noviter veniens ad notitiam*'.
6. That there were grounds upon which a new trial might be granted by the courts of record at Westminster.

The Act provided that the respective powers of the judge and jury, in regard to the determination of mixed law and fact, were to be the same as in any one of the courts of record at Westminster.⁸³ Exceptions could be taken in matters of law and the orders allowing or disallowing the exceptions were appealable.⁸⁴ Provision was also made for a case to be set down for final judgment before the Supreme Court, after the issues had been tried by the jury.⁸⁵ Judgments pronounced upon or after findings had been made by the jury could be taken on appeal to the Judicial Committee of the Privy Council, as being erroneous in law. However the facts as found by the jury could not be reversed, reviewed or questioned, except for the purpose of considering whether a new trial applied for should or should not be granted.

5.6. LEGAL PRACTITIONERS

On 5 June 1858 a Board of Public Examiners in Literature

82. Section 36.

83. Section 35.

84. Sections 36 and 38.

85. Section 40.

and Science was established by an Act of the Cape Parliament.⁸⁶ The Board was authorized to award two classes of certificates in law and jurisprudence. On the same day Parliament passed an Act for purposes of regulating the admission of advocates, attorneys, notaries and conveyancers.⁸⁷ It now became possible for holders of the higher certificate in law and jurisprudence to be admitted as advocates of the Cape Supreme Court.⁸⁸

Before proceeding to the higher certificate in law and jurisprudence, candidates were required to obtain either the higher or the lower class certificates in literature and science. The first examinations for the higher certificate in law and jurisprudence were held in January 1861, and papers were set on Roman Law, English Law, Dutch Law and the Law of Evidence.⁸⁹ Before the Board's functions were taken over by the University of the Cape of Good Hope in 1873, four candidates successfully obtained the higher certificates in law and jurisprudence. All of them attained distinction in their profession.⁹⁰

Applicants for admission as attorneys, who held either of the certificates in law and jurisprudence, were entitled to have their period of articles reduced from five to three years.⁹¹ The admission of notaries and conveyancers was brought under the control of the Supreme Court for the first time. Applicants for admission as notaries

86. Act No. 4 of 1858.

87. Act No. 12 of 1858.

88. Section 2.

89. Cape Parliamentary Papers, Select Committee Reports, G.22-'60.

90. Fred Watermeyer was on the point of establishing a brilliant career as an advocate when he died. James Buchanan became Judge-President of the High Court of Griqualand West. Francis Brown became Recorder of Griqualand West and Melius de Villiers was appointed Chief Justice of the Orange Free State.

91. Section 3, Act No. 12 of 1858.

had to satisfy examiners, appointed by the court, that they were qualified to practice.⁹² Applicants for admission as conveyancers were also required to undergo an examination, and the advocates retained their right to handle conveyancing work.⁹³

5.7. CIRCUIT COURTS

5.7.1. INTRODUCTION

One of the first accounts of the deplorable conditions which prevailed on circuit was penned by Judge Menzies. In a report to the Governor, he related his experiences on the October 1828 circuit in the following manner;⁹⁴

'I was able to accomplish it in nine weeks, only by continuing the sittings of the court, at the different towns, frequently till eleven and twelve o'clock at night, and sometimes till the morning of the following day, and by riding at the rate of between sixty and seventy miles a day, for several days successively, and, on one occasion riding eighty four miles, and, on another, one hundred and thirty miles in one day. I was sometimes under the necessity of causing the waggons, which conveyed the circuit clerk and my baggage, to travel all night in order that it might be able to reach the circuit towns in proper time. During the nine weeks of my absence from home, I can safely say that, at a very moderate average, I was either on the Bench or on horseback, for ten hours a day...During the journey, I was often compelled to sleep in the waggon; and, except, while actually in the circuit towns, I was invariably obliged to lodge in the houses of the Boers, whose circumstances, accommodation and habits of life rendered my residence

92. Sections 4 and 5.

93. Section 8.

94. C.O. 372, 1929. Observations on some parts of the Judicial System and Civil Establishment of the Colony of the Cape of Good Hope.

in their houses, during so long a period, very uncomfortable and irksome. From the experience I have acquired, during the last circuit, I feel myself warranted in stating that "due regard to the health and proper comfort of the judge on circuit" requires that some alteration should be made on the present arrangements for holding the circuits.'

The Cape Governors, however, were more concerned with the financial implications of the circuits and they did not appear to be unduly concerned with the 'health and proper comfort' of the circuit judges. The Governors were unable to balance the colonial budgets and they expressed concern over the ever increasing costs which were incurred by the judicial establishment. Financial considerations, and, in particular, the costs involved in maintaining the circuit system, prompted the Governor to institute an inquiry into the judicial establishment in 1845. In his evidence before the Committee, Judge Menzies, who appears to have become reconciled with the primitive conditions under which the circuit business had to be conducted, explained that the whole object and intention of introducing circuit courts was;⁹⁵

'To bring the administration of criminal and civil justice by superior tribunals of the colony as near to the residences of the inhabitants as the extent and circumstances of the colony would permit; and that it was considered that the institution of the circuit courts was highly expedient, as it would necessarily give a very great part of the population an opportunity of witnessing the administration of justice by the superior tribunals which they could not possibly otherwise have had; and that a knowledge of the rules and principles on which civil and criminal jurisdiction was administered in great Britain,

95. Report from the Committee of Inquiry into the Judicial Establishment, Cape Town : Saul Solomon, 1845, p.71.

would thus be generally communicated to the great benefit and advantage of the colony; and also that a closer and more effectual check over the inferior tribunals would thus be kept up than could otherwise be had, besides the advantage the inferior judges themselves would obtain by witnessing the proceedings of the circuit courts.'

The only improvement to come out of the inquiry, in so far as the circuits were concerned, was the abolition of the system of impressment for the transport of the circuit judges. The Secretary for Colonies considered it to be 'peculiarly inappropriate' and he directed that the 'administration of justice must not hereafter be preceded or accompanied by so flagrant a violation of one of the principles of justice'.⁹⁶ On 3 June 1847 the Governor issued a notice abolishing impressment.⁹⁷ In future the judges were required to arrange their transport on a contract basis.

The stresses of circuit life had taken its toll on the judges' health, and it was suggested that the deaths of Judges Menzies and Musgrave had been accelerated by their labours on circuit.⁹⁸ The resolution of the circuit problems was further complicated by the demands for an independent government and superior court in the Eastern districts. Further development, however, had to await the establishment of representative government.

96. G.H. 1/80. Letter dated 4 December 1846.

97. Cape of Good Hope Government Gazette, 3 June 1847.

98. Cape Parliamentary Papers, G.45-'59. Letter dated 12 January 1859.

5.7.2. SIR GEORGE CATHCART'S PROPOSALS

In December 1853 Sir George Cathcart approached the Chief Justice on the subject of the judicial establishment.⁹⁹ It appears, however, that the Governor was motivated by political rather than judicial considerations. He intended to offer the easterners an independent Supreme Court in order to diffuse political agitation for an independent government in the Eastern districts of the colony. Cathcart sought to obtain the judges' approval for the creation of the court before disclosing his true intentions. He accordingly played upon the hardship and difficulties involved in conducting half-yearly circuits throughout the colony. He drew the Chief Justice's attention to the recent annexation of a portion of the Kaffrarian territory and stated that, 'this circumstance cannot fail to add to the difficulties which you have had to encounter, and which has grown to be almost beyond the physical powers of the existing judicial establishment'.¹⁰⁰ He suggested that the difficulties could only be ameliorated by holding simultaneous circuits in the Eastern and Western districts of the colony. He proposed that additional judges should be appointed to accomplish the object. He further suggested that one or two of the judges should reside permanently in the Eastern districts.

Sir John Wylde was of the opinion that the appointment of additional judges to the Supreme Court would adequately

99. Cape Parliamentary Papers, unnumbered annexure.

Letter dated 8 December 1853.

100. Cape Parliamentary Papers, loc.cit.

meet 'the exigency as to the relief of the onerous circuit duty'.¹⁰¹ He pointed out that, as judges of the Supreme Court, they would be able to hold circuit courts in every district within the colony. Finally he stated that the judges had no objection, in principal, to the establishment of a separate court in the Eastern districts, on condition that it was subordinate to the Supreme Court. However Cathcart was recalled from the Cape before he could introduce his proposals to the newly established Parliament, and it was left to his successors to carry out the proposed reforms.

5.7.3. SIR GEORGE GREY'S PROPOSALS

Sir George Grey succeeded Cathcart as Governor of the Cape Colony on 5 December 1854. He took up Cathcart's proposals and introduced a Bill during the 1855 Parliamentary session which provided for the creation of a separate court in the Eastern districts of the colony. The Bill, however, was defeated by twenty votes to ten.¹⁰² Nonetheless it was considered desirable to afford some relief to the judges in view of the extension of the circuits. The Attorney-General was accordingly requested to draft a Bill for the better administration of justice. The Bill was passed by Parliament and was promulgated on 8 June 1855.¹⁰³

The Better Administration of Justice Act provided for

101. Cape Parliamentary Papers, loc.cit. Letter dated 26 December 1853.

102. See 6 for a discussion of the Bill.

103. Act No. 10 of 1855.

the appointment of an additional judge to the Bench of the Cape Supreme Court.¹⁰⁴ Two of the judges were required to preside together in order to form a quorum, and where a difference of opinion arose between the two, the decision of the court had to be suspended until three or more judges could be present. The Act further provided that, so long as the Bench consisted of two judges, the court would be properly constituted.¹⁰⁵ The latter section had been prudently inserted in order to avoid the difficulties which had arisen as a result of Menzies' death, when the court had to be suspended because the number of judges had fallen below the necessary quorum. In the event, Sir John Wylde was obliged to retire and the Bench was reduced to two judges.¹⁰⁶ In the case of Penketh v. Calvert¹⁰⁷ an objection to the jurisdiction of the court was overruled on the ground that the court, which consisted of two judges, was properly constituted.

The Bench was restored to three judges in December 1855.¹⁰⁸ However the post of Chief Justice remained vacant, and the 'evils' which the Better Administration of Justice Act had sought to remedy, were allowed to continue. The Bench only attained its intended strength in 1858, when Sir William Hodges was appointed Chief Justice. Sir George Grey was now in a position to tackle the thorny problem of the circuit courts. His solution was to increase the number of circuits to three per year. He accordingly requested the Colonial Secretary to obtain the judges'

104. Section 2.

105. Section 6.

106. Sydney Smith Bell and Egidius Benedictus Watermeyer.

107. (1855) 2 Searle 150.

108. Hendrik Cloete joined the Bench on 14 December 1855.

views on the proposal. It is clear, however, that he was determined to implement his proposal, notwithstanding the possibility that the judges would oppose the measure. He informed the judges that he had induced Parliament to agree to the appointment of a fourth judge on the understanding that more frequent circuits would be held. Finally he set about implementing the plan before the judges had submitted their written opinions on the subject.¹⁰⁹

5.7.4. REACTION FROM THE BENCH

5.7.4.1. SIR WILLIAM HODGES' OPINION

Sir William Hodges was opposed to the introduction of the third circuit on the ground that it would seriously endanger the health of the judges.¹¹⁰ He pointed out that the task of travelling two to three thousand miles could only be accomplished if adequate arrangements were made for the comfort of the judges. He referred to the 'inconvenient and crowded courts' where the temperatures sometimes reached 'above 100 degrees in the shade', and stated that the health of the strongest man would give way 'under such labours and their accompanying anxieties'.¹¹¹ He pointed out that, if the plan was implemented, the public would be deprived of the services of an adequate Bar both at Cape Town and on the circuit, and he stated that it would 'utterly destroy the prospects of the junior Bar'.¹¹² Furthermore he did not feel that the general

109. Cape of Good Hope Government Gazette, 31 December 1858.

110. Cape Parliamentary Papers, G.45-'59. Letter dated 12 January 1859.

111. Cape Parliamentary Papers, loc.cit., p.4.

112. Cape Parliamentary Papers, loc.cit.

business at the circuit towns was sufficiently important so as to render three circuits necessary, 'unless for the purpose of relieving the gaols by a more speedy delivery'.¹¹³ He pointed out that there would scarcely be any business to transact, and that one of the judges would be continually travelling on circuit to the great detriment of the business of the Supreme Court. He referred to the fact that he had recently conducted a circuit which had lasted from the beginning of September to 23 December 1858. He had held twenty courts, which was the largest number ever held on any one circuit, and he strongly recommended that the circuits should be split into a long and a short one, regardless of whether they were to be held twice or three times per year.

5.7.4.2. JUDGE BELL'S OPINION

Judge Bell was also opposed to the Governor's plan, and he requested the government to reconsider the question.¹¹⁴ He pointed out that it was necessary to consider the interests of the Supreme Court, the Bar, the litigants and the government. He explained that the Supreme Court would be 'incomplete and insufficient' without a body of advocates, and he stated that, 'the larger the body of advocates, the greater will be its independence and efficiency'.¹¹⁵ In his opinion, two or three advocates at the seat of the court would be wholly insufficient.

¹¹³.Cape Parliamentary Papers, loc.cit.

¹¹⁴.Cape Parliamentary Papers, loc.cit. Letter dated 4 January 1859.

¹¹⁵.Cape Parliamentary Papers, loc.cit., p.8.

He referred to the arrangements which were currently in force, and which provided for the holding of four civil terms and two circuits during the year. The civil terms, which lasted a month, were held in February, May, August and November. The first circuit began in March and ended late in June, and the second commenced in September and ended late in December. The circuit court therefore travelled throughout the second and fourth civil terms with its attendant Bar. This meant that there were only two civil terms in the year, during which the full strength of the Bar was in Cape Town. The attorneys and the litigants were without a Bar for eight months every year. They were confined to the choice of one or two advocates, both of whom held public office, and consequently even the limited service was not available throughout a considerable portion of the eight months. Bell stated that he had received complaints that justice could not be obtained for want of counsel. He expressed doubt as to whether the Supreme Court, with its limited period for working with a Bar at its full strength, gave the public the full benefit of its efficiency. Furthermore he saw little prospect of the Bar increasing, because the emoluments of practice in Cape Town were evidently not sufficient to induce gentlemen to confine themselves to that branch of practice. He stated that if the inducements were in fact present at Cape Town;¹¹⁶

'It would be inconceivable that the counsel who now travel circuit would not limit themselves from the hardship and privations of circuit travelling, which

¹¹⁶.Cape Parliamentary Papers, loc.cit., p.9.

are greater, I venture to say, than are endured by any Bar in the world.'

Bell was therefore of the opinion that any arrangement which increased the already excessive inconvenience to the Bar, and which further limited the means of access by litigants to that body, should be avoided, not only for the sake of the Bar, but also for the sake of the litigants who were dependent on their professional services. He pointed out that if the Governor carried out his plan to hold three circuits, the Bar would have to travel for eleven months in the year. He argued that the fundamental character of the Supreme Court would be destroyed if there was an insufficient Bar to plead before the judges, and he explained that;¹¹⁷

'The scheme of the Supreme and circuit courts, seems to have been that the Supreme Court should form the grand fountain for the administration of the law; the cases before it being patiently and fully investigated, carefully pleaded, fully argued and deliberately decided; and that its decision, so given, should form precedent for itself, for the circuit courts and for the magistrates' courts; and that the circuit court should be a mere adjunct to the Supreme Court for the trial of such cases, civil or criminal, as could not conveniently be brought to the Supreme Court. But the effect of the new regulation, if adopted, will, in my opinion, be to convert circuit courts into the institutions of primary importance, and to change the Supreme Court from a court of original jurisdiction into one for reviewing the decisions before circuit and magisterial courts, upon proceedings so crude as the proceedings of such courts are, and must continue

117. Cape Parliamentary Papers, loc.cit., p.11

to be. It will, in fact, turn the Supreme Court into a peripatetic institution for the improvement and instruction of magistrates which have been thrown broadcast over the country; for the plan seems to assume that every magistracy must be visited by a circuit court, while the court will have the delusive appearance of retaining its permanent local character.'

Bell felt that the movement should be towards building up the Supreme Court, and to reduce as much as possible, the necessity for the administration of justice by the circuits. He had thought that the reason for appointing the fourth judge was because the number of circuit towns had been greatly increased. However he had recently learnt that the probability of arranging more frequent circuits was one of the arguments which had influenced the Governor, and was used in Parliament to influence the appointment. He pointed out that he had no share in using that argument, and that neither his own opinion, nor that of any other member of the Bench, was called for upon the subject. Finally he pointed out that the costs would be double that of the existing arrangement.

5.7.4.3. JUDGE CLOETE'S OPINION

Judge Cloete pointed out that it was clear that an increase in the number of circuits was the main consideration behind the appointment of an additional judge.¹¹⁸ He therefore considered it to be the duty of the judges to endeavour, at least, to carry out the measure, irres-

¹¹⁸.Cape Parliamentary Papers, loc.cit., p.15.

pective of the personal inconvenience involved. However, in view of the deplorable state of the gaols, he recommended that six circuits should be held. He objected to three circuits on the ground that, to do the work effectively, a period of at least four months would be required for each circuit. He considered that a circuit of four months duration would be far too severe, and he stated that it would exert a constant strain upon the mental faculties and physical powers of most men. He accordingly proposed that the following arrangement should be adopted :¹¹⁹

1 January	Civil term with a full Bench and Bar at Cape Town.
1 February	One of the puisne judges to proceed on a long circuit, returning on or before 30 April.
1 March	One of the three remaining judges to proceed on a short circuit, returning on or before 15 April.
1 May	Civil term with a full Bench and Bar at Cape Town.
1 June	One of the puisne judges to proceed on a long circuit, returning on or before 31 August.
1 July	One of the three remaining judges to proceed on a short circuit, returning on or before 15 August.
1 September	Civil term with a full Bench and Bar at Cape Town.
1 October	One of the puisne judges to proceed on a long circuit, returning on or before 31 December.
1 November	One of the three remaining judges to proceed on a short circuit, returning on or before 15 December.

¹¹⁹.Cape Parliamentary Papers, loc.cit., p.17.

5.7.4.4. JUDGE WATERMEYER'S OPINION

Judge Watermeyer was opposed to the introduction of a third circuit.¹²⁰ He recommended that the half-yearly circuits should rather be divided into two long and two short ones. He pointed out that any plan, which did not take into account the presence of a Bar, would be unsatisfactory. In his opinion, Cloete's plan was the most acceptable. He had no doubt that three civil terms were sufficient for the business of the Supreme Court. He pointed out, however, that the plan would entail considerable additional labour on the part of the judges, and the members of the circuit Bar would be very seriously inconvenienced. In his opinion, the Bar would select the long circuit as it afforded the most business. He stated that if the advocates travelled the circuits regularly, they would be absent from home for nine months in the year, and during the remaining three months they would be in attendance in the Supreme Court. The Bar would therefore have no vacation and they would not be able to 'satisfy so great a demand upon their physical and intellectual powers for any long time'.¹²¹ He accordingly recommended that the plan should only be put into operation as a temporary measure.

5.7.5. THE INTRODUCTION OF THE THIRD CIRCUIT AND ITS AFTERMATH

Sir George Grey was determined to have his way, notwith-

120. Cape Parliamentary Papers, loc.cit. Letter dated 13 January 1859.

121. Cape Parliamentary Papers, loc.cit., p.20.

standing the united opposition of the Bench. The first of the three circuits was due to commence on 3 February 1859.¹²² However before it could get onto the road, the attorneys petitioned the Governor to have it postponed until the middle of February. The Governor acquiesced, but he insisted in carrying through his plan. In 1860 the Governor was forced to concede that the plan was untenable and the third circuit was discontinued, ostensibly on the ground that there was a diminution of crime in the colony. Other means had to be found to reduce the detention of awaiting trial prisoners.

In 1860 the Attorney-General was authorized to remit cases, originally intended for trial in the Supreme and circuit courts, to resident magistrates, who were granted special jurisdiction to impose sentences of up to two years imprisonment.¹²³ However the circuit court business continued to increase. In 1865 many of the problems were resolved when a separate court was established in the Eastern districts.¹²⁴ In future, simultaneous circuits could be held in both the Eastern and the Western provinces.¹²⁵

5.8. CIRCUIT COURT PROSECUTIONS AND THE OFFICE OF CLERK OF THE PEACE

5.8.1. INTRODUCTION

122. Cape of Good Hope Government Gazette, 31 December 1858.

123. Act No. 12 of 1860.

124. See ANNEXURES 1 and 2 for Tables depicting the Number of Criminal and Civil Cases tried in the Supreme and Circuit Courts during the period 1854-1863.

124. Act No. 21 of 1864.

125. Section 37.

In their report on the judicial establishment of 1826, the Commissioners had recommended that the English system of private prosecution should be introduced at the Cape. However the Secretary for Colonies scotched the recommendation and opted, instead, for the Scottish system of public prosecution.¹²⁶ He pointed out that the Cape lacked the 'complex machinery', which was a prerequisite for the English system, and he stated that he had no grounds to suppose that the 'necessary materials from which it might be constructed could be found there'.¹²⁷ He informed the Governor that the Attorney-General had been appointed the public prosecutor of all offences, and he requested the local government to frame the necessary laws for the regulation of criminal procedure in the Supreme and circuit courts. He directed the Governor to appoint clerks of the peace, throughout the colony, to assist the Attorney-General with the circuit court prosecutions, and he explained that they would only be allowed to prosecute under the direct authority of the Attorney-General. On 25 January 1828 the law of criminal procedure was amended in compliance with the Secretary for Colonies' directive.¹²⁸ The Attorney-General was vested with the right, and entrusted with the duty, of prosecuting, in the name and on the behalf of the King, all crimes and offences committed in the colony.¹²⁹ He was required to personally conduct the prosecutions in the Supreme Court.¹³⁰ Prosecutions in the circuit and district courts were to be conducted through the medium

126. See 2.3.6.

127. Theal, Cape Colony Records, vol.32, p.267. Letter dated 5 August 1827.

128. Ordinance No. 40 of 1828.

129. Section 6.

130. Section 7.

of the clerks of the peace, unless the Attorney-General specially appointed another person to appear on his behalf.¹³¹ In order to facilitate the implementation of the new system of prosecution, a former Scottish advocate was selected to fill the post of Attorney-General.¹³²

5.8.2. THE COMMITTEE OF INQUIRY INTO THE JUDICIAL ESTABLISHMENT

Doubts were, however, raised as to the efficiency of the office of clerk of the peace, and in 1845 the Governor instructed the Committee of Inquiry to consider whether the incumbents could be elevated to the magistracies and whether 'their present duties could be otherwise performed'.¹³³ The members of the Committee were overwhelmingly in favour of abolishing the office. The Attorney-General, who represented the minority opinion, recommended that advocates be appointed to conduct the circuit court prosecutions. The recommendation was vigorously opposed by Judge Menzies, who considered the clerks of the peace to be an integral component of the system of public prosecution.

The Secretary for Colonies supported the opinion of Judge Menzies, and he directed that, the office of public prosecutor, whether designated as clerk of the peace or by any other title, had to be preserved.¹³⁴

131. Section 7.

132. The appointment had first been offered to Menzies, who turned it down. It was subsequently given to Anthony Oliphant, who later, much to Menzies' chagrin, was appointed Chief Justice of Ceylon.

133. Report from the Committee, loc.cit., p.xlvii.

134. G.H. 1/180. Letter dated 4 December 1846.

5.8.3. SIR GEORGE GREY'S INVESTIGATION OF 1858

Although the local authorities were obliged to retain the office, they allowed the number of clerks of the peace to decline. When the Governor broached the subject in 1858, there were forty-five magistracies, while the number of clerks of the peace had declined to 'only twelve or thirteen men, some of whom were even made to officiate in several distant magistracies'.¹³⁵ In 1858 Sir George Grey raised the question of circuit court prosecutions as part of his overall plan to settle the circuit court system. He instructed the Colonial Secretary to obtain the judges' opinions on 'the mode of prosecution in the circuit courts' and 'the expediency of continuing the office of clerks of the peace'.¹³⁶

5.8.3.1. JUDGE CLOETE'S OPINION

Judge Cloete recommended that the office of clerk of the peace should be retained, and enlarged so as to equal the number of magistracies.¹³⁷ In his opinion, the clerk of the peace was of far greater importance, and more essential in the proper administration of justice, than had generally been recognized. He lamented the fact that the number of clerks of the peace had been allowed to decline, and he stated that 'the trend had seriously impaired the proper administration of justice in the colony' and 'had rendered the prevention and repression of crime

¹³⁵.Cape Parliamentary Papers, G.43 -'59. Letter dated 30 November 1858.

¹³⁶.Cape Parliamentary Papers, loc.cit. Letter dated 16 October 1858.

¹³⁷.Cape Parliamentary Papers, loc.cit. Letter dated 30 November 1858.

extremely uncertain and doubtful'.¹³⁸ He explained that the Attorney-General had to have a staff of efficient officers at the seat of every magistracy under his control, who were independent of, and distinct from, the local magistrates. It was his firm conviction that;¹³⁹

'The administration of justice throughout the colony will never be in a sound and satisfactory state, unless the Attorney-General has a staff of agents placed at the seat of every magistracy, who shall, by every post, communicate directly with his office in Cape Town, fully reporting to him every occurrence connected with the prevention and punishment of crimes during the week past; who shall, moreover, perform all the ministerial functions which, by the laws and usages of England, generally devolved on coroners; who shall direct and be responsible for the conduct of every criminal case, and transmit all information and documents to the Attorney-General which are necessary for him to frame his indictments.'

He conceded that, although some of the clerks of the peace were equal to the task of conducting circuit court prosecutions, others were 'sadly deficient'.¹⁴⁰ He therefore recommended that the circuit court prosecutions should be conducted by some of the advocates who attended the sittings of the circuit courts if the Attorney-General did not have sufficient confidence in the clerks of the peace. He concluded by stating that;¹⁴¹

'This would not, however, in any way affect the question as to the necessity of having, during the whole year, an efficient officer on the spot, in every magistracy, ready to inquire into every offence, and report the same promptly and fully, to prepare all the evidence necessary to convict those who are guilty of crimes, throughout the colony.'

138.Cape Parliamentary Papers, loc.cit., p.6.

139.Cape Parliamentary Papers, loc.cit., p.7.

140.Cape Parliamentary Papers, loc.cit., p.8.

141.Cape Parliamentary Papers, loc.cit.

5.8.3.2. JUDGE WATERMEYER'S OPINION

Judge Watermeyer drew attention to the increasing tendency to allow the clerks of the resident magistrates to conduct preparatory examinations and to prosecute in the circuit courts.¹⁴² He considered this to be a serious deviation from the basic principles underlying the administration of criminal justice, and he pointed out that the office of clerk of the peace was wholly incompatible with that of the clerk of the resident magistrate. He therefore recommended that an officer belonging to the Attorney-General's department should be stationed in each magisterial district in order to conduct the preparatory examinations, to collect the evidence, to prosecute the cases before the circuit courts and to obey the directions of the Attorney-General in the proper preparation of cases for trial. He did not think that it was necessary for the circuit court prosecutors to take up residence in the districts. However he suggested that a local official should be responsible for the preparation of the prosecution case.

He was of the opinion that the majority of the clerks of the peace, though equal to the task of prosecuting ordinary cases, lacked the qualifications, training and professional practice necessary for circuit prosecutions. He pointed out that acquittals had frequently taken place, because inexperienced persons who acted as clerks of the

¹⁴² Cape Parliamentary Papers, loc.cit. Letter dated 11 December 1858.

peace were unable to marshal the evidence at their command when opposed by able counsel.

He suggested that the circuit court prosecutions could be improved if the Attorney-General selected two of the circuit advocates to act as deputy prosecutors at the alternate circuit towns. In his opinion, an amount of £150 per circuit for each of the advocates would be sufficient to induce members of the Bar to undertake the duty. However he was in favour of retaining the office of clerk of the peace, and he recommended that;¹⁴³

'As soon as the revenue shall permit, this officer's duty, in respect of circuit criminal business, shall be confined to the preliminary investigation and preparation of cases for the circuit; the duty of prosecuting in court being entrusted to members of the Bar deputed by the Attorney-General, and guided by his general directions.'

Finally he suggested that the clerks of the peace should be required to hold the second class certificate in law and jurisprudence and he was in favour of allowing them to practice privately as attorneys in the circuit courts.

5.8.3.3. JUDGE BELL'S OPINION

Judge Bell pointed out that in the circuit courts, the prosecutions were conducted by the clerks of the peace, either of the district in which the crime was committed or in which the court was held, or by a person specially appointed by the Attorney-General.¹⁴⁴ However he explained

¹⁴³ Cape Parliamentary Papers, loc.cit., p.11.

¹⁴⁴ Cape Parliamentary Papers, loc.cit. Letter dated 13 December 1858.

that when sudden illness prevented the attendance of such a prosecutor, the magistrate of the district in which the court was to be held, was authorized to appoint a prosecutor during the sitting of the court. He was therefore of the opinion that the basic principles underlying the administration of criminal justice had been adhered to in the circuit courts.

He recommended that a public prosecutor should be appointed to every seat of magistracy in the colony. He also thought that it would be advisable for the Attorney-General to appoint advocates to act for him at the different circuit towns. In his opinion, this arrangement would not interfere with those duties of the clerk of the peace, which related to the examination of witnesses, the marshalling of evidence and the preparation of cases for the prosecuting advocates. The clerk of the peace would retain the responsibility for the preparation and prosecution of cases before the magistrate's courts. He endorsed Watermeyer's recommendation that the clerks of the peace should be required to hold the second class certificate in law and jurisprudence, and he suggested that they should only be appointed on the recommendation of the Attorney-General.

5.8.4. THE RESULT OF THE INVESTIGATION

No immediate action was taken by the government in con-

nection with the office of clerk of the peace. The judges' opinions were, however, published and tabled in Parliament during the 1859 session. The recommendations that advocates should be appointed to conduct the circuit court prosecutions were accepted in principle, and the Attorney-General began to make use of their services in 1860. However the clerks of the peace continued to bear the brunt of the prosecution work until 1865. The following Table, which depicts the remuneration paid to the advocates for conducting circuit court prosecutions during the period 1860-1865 inclusive, indicates that the clerks of the peace continued to play an important part in the circuit courts until 1865 :¹⁴⁵

<u>YEAR</u>	<u>REMUNERATION PAID</u>
1860	£50
1861	£79
1862	£83
1863	£341
1864	£200
1865	£859

5.9. THE SHERIFF'S OFFICE AND THE SERVICE OF THE CIVIL AND CRIMINAL PROCESS

5.9.1. INTRODUCTION

The office of sheriff, which had been created in 1827, was based on the corresponding office in England. The

¹⁴⁵.The figures have been taken from the Blue Books and have been rounded off to the nearest pound.

sheriff, who was responsible for the execution of the civil and criminal process of the Supreme and circuit courts, was authorized to appoint deputies throughout the colony to assist him in the performance of his duties. He was appointed on an annual basis, at a fixed salary, and was responsible for the acts of his deputies, who were paid out of the fees which were levied for the service of the court process. Although the judges were authorized to prescribe and define the precise nature of the sheriff's duties, the local legislature took the initiative and issued an Ordinance on the subject in 1828.¹⁴⁶ The Ordinance made it compulsory for the sheriff and his deputies to attend the daily sittings of the Supreme and circuit courts respectively.¹⁴⁷ In addition to attending to the civil business, the sheriff and his deputies were required to receive and detain in custody;¹⁴⁸

'All persons arrested upon any sentence, decree, judgment, writ, summons, rule, order, warrant or process of the Supreme and circuit courts.'

The judges fixed a tariff of fees and charges, and the sheriff and his deputies were required to submit regular returns to the registrars of the Supreme and circuit courts.

5.9.2. THE COMMITTEE OF INQUIRY INTO THE JUDICIAL ESTABLISHMENT

Although it was not specifically mentioned in the terms

146. Ordinance No. 37 of 1828.

147. Section 3.

148. Section 3.

of reference, the sheriff's office received the attention of the Committee which had been set up to inquire into the judicial establishment in 1845. The majority of the members recommended that the deputies should be paid fixed salaries. The minority were of the opinion that the sheriff would first have to be relieved of his responsibility for the acts of the deputies before the recommendation could be implemented. They also suggested that the duty of summoning the jurors and the witnesses in criminal cases should be undertaken by the police. Judge Menzies was opposed to paying the deputies fixed salaries on the ground that the practice was alien to the law of England and Scotland. He pointed out that the deputies had been found to be 'most prompt, active and efficient'.¹⁴⁹ In his opinion, salaried deputies would perform less efficiently, and he stated that in the course of eighteen years, 'no man could prove that he had lost a shilling by the neglect, misconduct or mismanagement of the sheriff's department'.¹⁵⁰

The Secretary for Colonies was not prepared to allow the deputies to be paid by fixed salaries. He pointed out that in Van Diemens Land, where the proposed recommendation had been implemented, the greatest difficulties had been encountered. He stated that under the prevailing system at the Cape, 'the risk and labour was in direct proportion to the reward and motive for exertion'.¹⁵¹ He also explained that the amount of risk and labour

149. Addenda to the Report, loc.cit., p.17.

150. Addenda to the Report, loc.cit.

151. G.H. 1/180. Letter dated 4 December 1846.

fluctuated more in this branch of the public service than in any other.

5.9.3. THE COMBINATION OF THE SHERIFF'S OFFICE WITH THAT OF THE MASTER

In 1856 the government decided to suspend the sheriff and to combine his office with that of the master of the Supreme Court. It transpired that an action for damages had been successfully brought against the sheriff, on the grounds of the negligence of one of his deputies.¹⁵² The sheriff was relieved of his duties and the Governor called on the judges to give an opinion on the feasibility of combining the office with that of the master. The judges, however, were only prepared to approve the combination of the two offices as a temporary measure.

The matter was subsequently taken up by the Finance Committee of the House of Assembly.¹⁵³ The Committee members decided to institute a general investigation into the functions and duties of the sheriff's office, and they opened proceedings on 31 March 1856. The first witness to be called was Judge Bell. However he proved to be most unhelpful. When he was asked to give his opinion on the combination of the sheriff's office with that of the master, he replied in the following manner;¹⁵⁴

'This is a matter which I must confess myself profoundly ignorant of, as in the course of my judicial duties, nothing has come before me which could enable me to form an estimate upon which I

152. *Heugh and Fleming v. The High Sheriff* (1856) 2 Searle 280.

153. *Cape Parliamentary Papers*, Select Committee Reports, 1856.

154. *Cape Parliamentary Papers*, loc.cit., Minutes of evidence, p.3.

could either rely myself, or ask anyone else to rely, as to the amount of duty which has to be performed by the master and the high sheriff.'

After this somewhat frank and honest statement, Bell was excused. However he subsequently wrote to the Committee on the subject of the deputies. In his letter, he stated that he had no objection to the deputies being paid fixed salaries. On the contrary, he approved of the arrangement subject to the responsibilities of the deputies being secured. He also stated that the number of deputies should be increased, 'as the present paucity of their numbers entails heavy charges upon the litigants, from the great distances which these officers have to travel and to charge for'.¹⁵⁵

The next witness to be called was the master of the Supreme Court. He informed the Committee that he was not aware of any reason or legal impediment which prevented the combination of the two offices.¹⁵⁶ Furthermore he had no objection to the government appointing the deputies at fixed salaries. However he pointed out that it would be difficult to adjust the salary scales, because the business of the court varied in the different districts of the colony. He suggested that the sheriff should be allowed to nominate the deputies, and that he should be entrusted with the duty of obtaining the necessary security from each officer.

The Committee then called on George Fischer, a clerk in

155.Cape Parliamentary Papers, loc.cit.

156.Cape Parliamentary Papers, loc.cit., p.4.

the sheriff's office, in order to obtain information on the inner workings of the office. Fischer informed the Committee that the staff consisted of himself, Mr. Van Blommestein and a Mr. Buyskes, who attended the office twice weekly for the purpose of entering letters in the letter books.¹⁵⁷ The office also employed a messenger. The chief clerk was responsible for keeping the accounts of the deputies, the Cape Town attorneys and the sheriff's staff. Fischer's own duties entailed the transmission of all the civil and criminal process of the court to the several divisions in the colony. He was also responsible for maintaining a register of fees, and had to account to the government in this respect. The sheriff personally drafted all the important letters, received and paid moneys, checked accounts and generally superintended the business of the office. He was also required to attend the sittings of the Supreme Court.

After calling on a number of attorneys and deputy-sheriffs to give evidence, the Committee members decided to approve the arrangement whereby the master would continue to carry out the sheriff's duties. However they offered no opinion as to whether the deputies should be paid fixed salaries.

5.9.4. SIR GEORGE GREY'S INVESTIGATION OF 1858

In October 1858 the Governor instructed the Colonial Sec-

¹⁵⁷.Cape Parliamentary Papers, loc.cit., p.5.

retary to obtain the opinion of the judges on 'the expediency of continuing the combination of the office of high sheriff with that of the master of the Supreme Court'.¹⁵⁸ The judges were also requested to consider the position regarding the service of the court process and the constitution and emoluments of the deputy-sheriffs.

5.9.4.1. JUDGE CLOETE'S OPINION

Judge Cloete was of the opinion that it would be impossible to expect any person, who held the combined offices of master and sheriff, to properly discharge any additional duties.¹⁵⁹ He was also convinced that the sheriff's office could not be permanently joined to the master's office without harming the efficiency of both offices. He pointed out that, in many instances, the duties of the two offices were incompatible, and he cited the case where the master appeared in court as plaintiff or defendant, and then had to execute the judgment in his capacity as sheriff. In cases of this nature, it had been necessary to appoint a special officer to serve and execute the process of the court. In Cloete's opinion, this was both expensive and inconvenient. He stated that the sheriff's duties were more important, and required more time and attention, than was generally supposed. He therefore recommended that the master should be relieved of all duties not connected with his office.

158. Cape Parliamentary Papers, G.43 '59. Letter dated 16 October 1858.

159. Cape Parliamentary Papers, loc.cit. Letter dated 30 November 1858.

With regard to the deputies, he pointed out that they were not servants of the government, but agents of the sheriff, to whom alone, they were responsible. He drew the Governor's attention to the position in the country districts, where the office hardly yielded sufficient to defray the expense of horses and forage, which were necessary to enable the deputies to meet sudden emergencies. He stated that the sheriff had experienced difficulty in finding active and intelligent men to take on the office of deputy in the country districts. He was therefore of the opinion that;¹⁶⁰

'The anomalous position of the deputy-sheriff would either compel the government to confer the office of messenger on those previously holding the office of deputy-sheriff, or compel the sheriff to constitute as his deputy the messenger, appointed by the government, in which case the sheriff would very justly consider himself relieved from the responsibility now resting upon him for every act or omission of his deputies, and would virtually entail the responsibility on the local government.'

5.9.4.2. JUDGE WATERMEYER'S OPINION

Judge Watermeyer had no hesitation in stating that the permanent combination of the two offices was inexpedient.¹⁶¹ He was opposed to any change in the constitution of the office of the sheriff and the duties which had to be performed by him. He was also opposed to any scheme whereby the duties of the deputies would be handed over to the clerks in the magistrates' courts. In his opinion the sheriff should be allowed to control the appointment of the deputies, and he stressed the necessity for maintaining the sheriff's responsibility for the acts of his deputies. He had no objection to allowing the chief constable to summon witnesses in magisterial districts

¹⁶⁰.Cape Parliamentary Papers, loc.cit., p.6.

¹⁶¹.Cape Parliamentary Papers, loc.cit. Letter dated 11 December 1858.

where there were no deputies. He was also in favour of retaining the system whereby the deputies were paid by fees, on the grounds that it would be difficult to apportion salaries because the business of the courts varied in the districts.

5.9.4.3. JUDGE BELL'S OPINION

Judge Bell pointed out that when he had approved of the combination of the two offices in 1856, it had been as a temporary measure. At the time, he had not seen any incompatibility in the arrangement. However he was now of the opinion that the arrangement was highly inexpedient and should never have taken place, except for a temporary purpose.¹⁶² He was satisfied that the proper duties of the master were so extensive, that if they were performed according to the spirit of the law, they would occupy the whole time and attention of one individual. He stated that there was an obvious incompatibility in the combination of the two offices;¹⁶³

'Because the officer holding them may have, as master, to obtain orders of the court which he himself, as sheriff, may have to carry into execution, and under Ordinance 105 he may, as master, have to be plaintiff in an action, and, as sheriff, have to serve and execute process in his own action.'

Furthermore he stated that the duties of the sheriff, if discharged with the energy of supervision which they required, were sufficient to occupy the undivided time and attention of the holder of the office.¹⁶⁴ He pointed out

162. Cape Parliamentary Papers, loc.cit. Letter dated 13 December 1858.

163. Cape Parliamentary Papers, loc.cit., p.20.

164. Cape Parliamentary Papers, loc.cit., p.21.

that the combination was also inexpedient because the sheriff was required to personally attend the sittings of the Supreme Court. Prior to the combination of the offices, he had always been in attendance. However, when the combination took place, the court had excused the sheriff's attendance, on the grounds that it would have been impossible for him to give it. As a result, the court had been without an officer who could carry out its orders; and where reference had to be made to the sheriff, in regard to the proper service of process, the proceedings of the court had on occasion to be stopped until the sheriff could be summoned into court.

He had no objection to the government taking over the appointment of the deputies, provided that they could still be kept under the sheriff's control, 'so as to preserve the benefits of centralization and unity in the performance of duties'.¹⁶⁵

5.9.5. THE RESULT OF THE INVESTIGATION

The judges' opinions were tabled in Parliament during the 1859 session. However no action was taken until June 1860, when a Select Committee was appointed to consider the matter.¹⁶⁶ On 13 July 1860 the Chairman of the Committee reported that;¹⁶⁷

'The evidence taken preponderates against the system of the offices of the master of the Supreme Court and high sheriff being held by one officer.'

165. Cape Parliamentary Papers, loc.cit., p.20.

166. Cape Parliamentary Papers, Select Committee Reports, A.17 - '60.

167. Cape Parliamentary Papers, loc.cit., p.iii.

The two offices were finally separated in 1861 and W.A.J. de Smidt was appointed sheriff.¹⁶⁸ However the members of the Committee were unable to reach agreement as to whether the deputies should be paid a fixed salary, and they continued to be remunerated by fees.

168. Cape of Good Hope Blue Book, dated 1861.

ANNEXURE 6

Table depicting number of Criminal Cases tried in the Supreme and Circuit Courts,
during the period 1854 to 1863, both inclusive

<u>YEAR</u>	<u>SUPREME COURT</u>	<u>CIRCUIT COURTS</u>
1854	43	307
1855	45	242
1856	56	230
1857	43	306
1858	42	398
1859	42	729
1860	48	466
1861	40	406
1862	52	344
1863	66	512

ANNEXURE 7

Table depicting the number of Civil Cases tried in the Supreme and Circuit Courts,
during the period 1854 to 1863, both inclusive

<u>YEAR</u>	<u>SUPREME COURT</u>	<u>CIRCUIT COURTS</u>
1854	382	443
1855	475	-578
1856	439	521
1857	380	280
1858	325	258
1859	422	348
1860	606	324
1861	563	287
1862	855	485
1863	1,286	573

CHAPTER SIX

6. THE ESTABLISHMENT OF THE EASTERN DISTRICTS COURT OF THE CAPE OF GOOD HOPE

6.1. INTRODUCTION

Events leading up to the establishment of the Eastern Districts Court can be traced back to the report of the Commission of Inquiry of 1823. Commissioners Bigge and Colebrooke had recommended that the colony should be divided into two distinct and separate provinces for both administrative and judicial purposes. However the Secretary for Colonies rejected the recommendation, and opted instead for a centralized Supreme Court at Cape Town with jurisdiction throughout the colony. This met with a great deal of opposition from the majority of the English speaking inhabitants in the Eastern districts, and they began to agitate for a separate court as part of their overall strategy for an independent government. The movement which led to the establishment of the Eastern Districts Court must therefore be considered in the broader context of Eastern Cape separatism. There can be no doubt that increasing dissatisfaction with the half-yearly circuits played a prominent role in convincing the government to establish the court, but political rather than judicial consideration proved to be the predominant factor.

6.2. THE CREATION OF A 'DISTINCT AND SEPARATE GOVERNMENT' IN THE EASTERN DISTRICTS

In December 1835 the Secretary for Colonies informed the Governor that he proposed to appoint a Lieutenant-Governor to administer the Eastern districts of the colony.¹ He explained that the Lieutenant-Governor would have the sole responsibility for administering the area 'within the boundaries to be assigned to his command'.² Letters patent creating the office were issued on 19 February 1836, and Sir Andries Stockenström was appointed to the post. The districts of Albany, Somerset, Uitenhage and Graaff-Reinet were constituted into a 'distinct and separate government', and Stockenström was granted authority, similar to that of the Governor, within the districts. Laws effecting the Eastern districts had to be submitted in advance to the Lieutenant-Governor, who could make representations on the subject. However the Governor and the Legislative Council retained the power to legislate for the Eastern districts. Furthermore matters affecting the administration of justice and the jurisdiction of the Supreme and circuit courts were specifically excluded from the ambit of the Lieutenant-Governor's authority.³ The restriction did not serve to deter Stockenström from approaching the Secretary for Colonies, with the suggestion that 'one of the judges of the Supreme Court should reside permanently in the Eastern districts'.⁴ However the Secretary for Colonies

1. G.H. 1/107. Letter dated 26 December 1835.

2. loc.cit.

3. G.H. 1/108. Letters patent dated 19 February 1836.

4. G.H. 1/126. Letter dated 12 January 1839.

replied that the suggestion 'involved considerations of an important nature which precluded him from pronouncing a decided opinion upon it, without receiving a report on the subject from the different authorities in the province'.⁵

Stockenström's successor, Colonel John Hare, was not prepared to express an opinion on the desirability of stationing a judge in the Eastern districts. When called upon to give evidence before the Committee which was investigating the judicial establishment in 1845, he replied by stating the following;⁶

'I feel myself quite unqualified to enter upon the subject..., and I therefore do not venture to offer, as a result of my own reasoning from experience, anything like correct views upon the beneficial application of any altered system as compared with the present one, as far as the judicial system of this colony is concerned, and thus I am not prepared to recommend the appointment of a resident judge for the Eastern districts.'

In 1847 Hare was replaced by Sir Henry Young, who was instructed to institute an inquiry into the subject of the separation of the Eastern districts from the rest of the colony. According to Le Cordeur, 'Young siezed the opportunity and within four days he had instituted the inquiry'.⁷ The report of the Grahamstown Committee, which had been set up as a result of Young's inquiry, recommended that a distinct and separate government and judicial establishment should be established in the Eastern districts.⁸ The

5. G.H. 1/126. Letter dated 29 January 1839.

6. Report from the Committee of the Legislative Council on the Judicial Establishment, Cape Town : Saul Solomon, 1845, Appendix X1, p.li.

7. Basil A Le Cordeur, The Politics of Eastern Cape Separatism 1820-1854, Cape Town : OUP, 1981, p.178.

8. Documents relative to the Question of a Separate Government for the Eastern Districts of the Cape Colony, Grahamstown, 1847, p.129-175.

Governor added his support to the recommendation for an independent government in the Eastern districts. However he did see the need to appoint additional judges as the Supreme Court would continue to 'bear exactly the same relationship to the Eastern districts as it already did to the Western'.⁹ Before the matter could be taken any further, Young was recalled and the Lieutenant-Governorship was allowed to lapse.

Prior to his departure, Young had unsuccessfully crossed swords with the formidable Judge Menzies over the Lieutenant-Governor's right to commute sentences passed by the circuit court judges in the Eastern districts. Young had received a petition for the remission of a sentence in a case which had been tried by Judge Menzies on the Eastern circuit. Menzies refused to comply with the Lieutenant-Governor's request for a report on the trial, on the grounds that 'the power of commuting or remitting sentences resided in the Governor alone'.¹⁰ Young persisted with his request for a report and threatened to suspend Menzies if he did not comply. However the Secretary for Colonies upheld Menzies on the issue and Young was censured for threatening to suspend the judge.¹¹

6.3. THE COMMITTEE OF INQUIRY INTO THE JUDICIAL ESTABLISHMENT

In his letter instructing the members of the Legislative

9. Le Cordeur, op.cit., p.190.

10. L.G. 299. Letter dated 10 May 1847.

11. G.H. 1/187. Letter dated 27 September 1847.

Council to set up a Committee to inquire into the judicial establishment, the Governor specifically requested that the feasibility of appointing a resident judge at Grahamstown should be considered.¹² When the Council met to debate the Committee reports, the Colonial Secretary made the following remarks on the evidence which had been taken on the subject;¹³

'But Sir, look to the evidence of the Bench and the Bar. You have the evidence of the Chief Justice, that he sees no objection to a single judge at Grahamstown, although he is for retaining three in Cape Town. Mr. Justice Musgrave concurs as to the judge at Grahamstown, and even suggests the mode of supplying the appointment from the Bench at Cape Town, and thus reducing the Supreme Court to two judges. Mr. Justice Menzies is strenuously opposed either to a judge at Grahamstown, or any diminution of the Supreme Court. So much for the Bench. Now for the Bar. Mr. Advocate Cloete insists in the strongest terms, by his recorded dissent, for a judge at Grahamstown. Mr. Advocate Ebdon says, that sooner or later, they must have a judge at Grahamstown; and thinks a fourth judge is not necessary for that appointment, and suggests how the two judges in Cape Town should conduct the court. Mr. Advocate Brand supports the appointment of a judge at Grahamstown stoutly; and is also for reducing the Supreme Court to two judges. The only other practising barrister is my friend the Attorney-General, and we have his views in the minority's report. Here, sir, is produced evidence enough against the opinions of the minority, and which goes to show that their report upon these points, is contrary to the evidence.'

The Colonial Secretary's claims, however, must be considered in the light of the evidence which is available.

12. Report from the Committee, loc.cit., p.xlvii.

13. Addenda to the Report and Minutes of Evidence of the Committee of Legislative Council on the Judicial Establishment, Cape Town : Saul Solomon, 1846, p.6.

The Chief Justice gave his evidence on 14 and 15 April 1845. On 15 April he was requested to state his views on the establishment of a branch of the Supreme Court at Grahamstown or in some other part of the Eastern districts. He replied as follows;¹⁴

'General views, in relation to the most prompt and effective administration of justice would be benefited... I consider the establishment of such a court, as a branch of the Supreme Court, and thus, in perfect union with it in jurisdiction and general mode of procedure. (It) would remove in a great measure the objections which might arise to a single judge, "exercising an unlimited jurisdiction in all cases civil and criminal over so large a proportion of the inhabitants"; while the branch court, should any contingency require it, might be holden before one of the other judges of the Supreme Court. The court might wholly subsist as the "circuit court", as now established, perfectly independent, as to the causes in hearing before it, and yet to be aided when required by the conjoint opinion of the full Bench of the Supreme Court. I am not at the moment advised of any objection, in law or principle, which would render such a court for the "Eastern Province" less serviceable to the public interest, if its jurisdiction were wholly severed from that of the Supreme Court.'

From the evidence of the Chief Justice it is clear that he was in favour of having a 'branch of the Supreme Court' in the Eastern districts.

Judge Musgrave recommended that the jurisdiction of the magistrates should be increased, and he suggested that a system of quarter sessions should be established with jurisdiction in all cases 'not meriting a severer punishment than two or three years imprisonment'.¹⁵ He stated

14. Report from the Committee, loc.cit., Minutes of Evidence, p.25.

15. Report from the Committee, loc.cit., p.33

that;¹⁶

'In the event of district sessions being established... there would not be any necessity for periodical circuit courts, provided a judge were stationed at Grahamstown. The judge at Grahamstown should, I think, possess the powers throughout the Eastern division which are now exercised by the circuit judge, and should be a member of the Supreme Court. There should be an appeal from his decision to the judges at Cape Town, as there is from the circuit judge under the existing Charter. Under this arrangement, there would of course be a necessity for a registrar of the court of Grahamstown, and references might take place from that court to the master in Cape Town. Even supposing that it were expedient to continue the circuits, a great saving of the expense of transport of the judges would be effected by this arrangement, because the judge at Grahamstown, in making the circuit of the Eastern division, would cut off the Karoo at least; and, on the other hand, the judge from Cape Town need not go further than George, and the circuits being thus shortened, the judges might not require more than one wagon, instead of two.'

It is clear therefore that Judge Musgrave supported the stationing of a judge at Grahamstown in order to solve the problems of the circuit system and on the grounds of economy. However the Colonial Secretary's statement that Musgrave suggested that the judge should be supplied from the Bench at Cape Town must be considered in the light of the following evidence;¹⁷

'If it were determined to reduce the Supreme Court to two judges, the duties at Grahamstown could, of course, be performed by one of the present judges, but it would leave but a very weak court to meet occasional circuits; and, in case of difference of opinion, there would be great difficulty in obtaining a prompt administration of justice.'

16. Report from the Committee, loc.cit.

17. Report from the Committee, loc.cit.

In his evidence, Judge Menzies dealt with the three reasons which had been raised in favour of the appointment of a permanent judge at Grahamstown. The first was 'that by the establishment of such a judge, if circuits were continued, a saving would necessarily be effected by the colony being divided into two circuits, Eastern and Western; one of which to be performed by the Eastern judge, and the other by one of the judges of the Supreme Court'.¹⁸ This was refuted by Menzies, who produced a Table¹⁹ depicting the distance in hours, by waggon from Cape Town round the whole colony by the ordinary route, to be 312 hours. The distance travelled on the Western circuit from Cape Town to George and back would be 100 hours; and the distance travelled on the Eastern circuit from Grahamstown to Beaufort and back would be 199 hours. The sum total would be 308 hours, and the result would be a saving of only 4 hours. If Beaufort were included in the Western circuit, then the distance travelled on that circuit would be 168 hours, and the distance travelled on the Eastern circuit 162 hours. The sum total would be 330 hours, and the result would be an increase in 18 hours. Menzies was therefore convinced that no saving would be effected by establishing two circuits to be travelled by separate judges in the Eastern and Western districts of the colony.

The second reason which had been advanced in favour of establishing a permanent judge at Grahamstown was 'that

18. Report from the Committee, loc.cit., p.97.

19. ANNEXURE 8.

a saving might be effected by abolishing circuits, at least, for the Eastern Province, and sending up to the locality where the Eastern judge resided, the prisoners committed for trial in all other districts of the Eastern Province, whereby the trials could sooner be disposed of, and the cost of maintenance before trial greatly diminished'.²⁰ Menzies conceded that the second reason was sound, but he was of the opinion that the additional expense which would be incurred in transporting the prisoners and witnesses to the residence of the judge would be greater than the expense of the judge's transport in making a circuit of the districts. Moreover it would put the inhabitants to a much greater inconvenience.

The third reason was 'that the appointment of an Eastern judge would facilitate the disposal of the civil business of the district'.²¹ Menzies agreed that this would be the case in so far as it related to the particular district in which the judge was located, but he was not prepared to accept that it would produce a similar advantage in the other districts. He pointed out that cases which required the attendance of the parties and witnesses from the other districts would involve them in greater expense and inconvenience than that incurred by the circuit court trials. Furthermore in liquid cases, the only saving would be the difference in postage.

Menzies dealt with the needs of the inhabitants of the

20. Report from the Committee, loc.cit.

21. Report from the Committee, loc.cit.

Eastern districts in the following manner;²²

'I have understood that the inhabitants of the Eastern districts, and particularly of Albany, urge, in favour of the appointment of an Eastern judge, that the number of cases which occur there is so great as to entitle them to have a Supreme Court at the Eastern end of the colony. I am of the opinion that this is not the case, and that they have no more right to claim that they shall have a Supreme Court at Grahamstown, than the people of Lancashire and Yorkshire have to claim that Supreme Courts should be established at York or Liverpool; or the people of the North of Scotland to a Supreme Court at Inverness. I am convinced that the inhabitants of the Eastern districts of the colony, with the power of resorting to the Supreme Court, and the circuit courts held half-yearly in their own districts, suffer no greater inconvenience than the inhabitants of the counties in England and Scotland do; and that the grounds of their present complaint could not be obviated, so as to satisfy those who make it, without erecting a Supreme Court in the district town of each district.'

Finally he objected to the appointment of a resident judge in the Eastern districts if it meant having to reduce the Bench of the Supreme Court to two judges. He pointed out that this was the worst number of judges, and stated that it would greatly impair, and possibly destroy, the efficiency and utility of the court. On the other hand, if a fourth judge were appointed, 'the expense of his salary and those of the officers attached to his court would occasion a great increase in the public expenditure, and one which, if it could be borne by the public, would

22. Report from the Committee, loc.cit., p.98.

be much more beneficially employed in increasing the number of resident magistrates'.²³ He pointed out that the judge would forget his law and become 'a mere arbitrator', and that his judgments could not be considered as precedents on which it would be safe to rely.

In his evidence, Advocate Ebdon expressed some doubt as to the desirability of appointing a resident judge at Grahamstown. However he felt that the appointment would eventually have to be made and expressed himself in the following manner;²⁴

'Upon the whole, I doubt whether it would not be better to do without a judge at Grahamstown; although I do not see any great objection to it, except, perhaps, the great expense of a separate court of justice there, the great litigation that it would create and the want of uniformity in the decisions of the Grahamstown court and the Supreme Court. I know that there is a difference of opinion at Grahams-town as to the expediency of having a judge there... I think that sooner or later they will wish to have a judge at that end of the colony; and I must say, I am surprised that they have not petitioned for one.'

Advocate Brand, who was a staunch supporter of a resident judge at Grahamstown, gave the following evidence;²⁵

'I think decidedly there is. The number of civil and criminal cases, and their importance, in many instances require it. I am so impressed with the unsatisfactory mode of the administration of justice by a reference to the judge in the Eastern division, that if I were to choose for myself, I would prefer having less magistrates for the purpose of securing good and effectual public security in the higher tribunal; and seeing that the expense of an add-

23. Report from the Committee, loc.cit.

24. Report from the Committee, loc.cit., p.135.

25. Report from the Committee, loc.cit., p.41.

itional judge in the Eastern province might increase the expenditure to too large an amount, I therefore suggested the idea of the chief magistrate at Cape Town to sit in those cases in which three judges are required.'

Advocate Cloete was also in favour of appointing a resident judge in the Eastern districts, and he recommended the following;²⁶

'By placing the districts of Albany, Somerset, Graaff-Reinet, Uitenhage and Beaufort under a judge to be stationed either at Graaff-Reinet, Uitenhage, Port Elizabeth or Grahamstown, that single judge would be enabled to make a circuit never occupying more than four or five weeks of his time. This would at once enable him to form his circuit tour, with the aid of one waggon only, which would reduce the present expense of transport by one half. The jurisdiction, power and authority of the judge in the Eastern districts could be regulated in the same manner as the constitution of the District Court in Natal has been provided for; and by constituting the Supreme as the Appeal Court from these two tribunals, sufficient work will be created for the former; and by bringing important cases in appeal before the Supreme Court, a uniformity of decisions may be expected which will operate as a salutary check upon the proceedings of the two inferior courts.'

The Attorney-General, who represented the minority opinion on the Committee, pointed out that the question as to whether a separate court would be desirable or not, was not a 'naked' one. In his opinion, the question was simply;²⁷

'Whether, in order to create such a court as that of one judge in Grahamstown, we should leave such a court as that of two judges in Cape Town.'

26. Report from the Committee, loc.cit., Dissent dated 6 November 1845, p.xiv.

27. Report from the Committee, loc.cit., Proceedings, p.xxxii.

The minority were of the opinion that it would be most unwise to reduce the Supreme Court Bench to two judges. They pointed out that it would hardly reduce the expenditure, and stated that 'it would leave the courts at either end of the colony so constituted, that the public confidence in the efficient administration of justice must almost necessarily be shaken'.²⁸ In dealing with the proposal to create a separate but subordinate judge at Grahamstown, the Attorney-General stated the following;²⁹

'Assuming his salary to be equal to that of a puisne judge in Cape Town, the establishment of a court of the most economical description would necessarily entail considerable expense. Your Committee believe that the amount which would be required may be more beneficially applied in adding to the existing magistracy. With two circuits in the year to the Eastern districts, and two posts in the week from thence to Cape Town, where the Supreme Court sits, your committee conceive that the reasonable necessities of the inhabitants of Albany are sufficiently consulted. In regard to the Eastern districts other than Albany, your Committee have reason to conclude that whether the court is placed at Grahamstown or Cape Town is to them a matter of indifference. But that the non-local court to which they have recourse should be composed of three judges or of one, is by no means a matter of indifference. Your Committee, while they have no doubt that the inhabitants of Albany would gladly possess a court of equal efficiency with the present Supreme Court, are by no means certain that the general feeling amongst them would be favourable to the erection of a court consisting of but one judge to whom, and whom only, they could, in the first instance, look for justice. Related as the

28. Report from the Committee, loc.cit.

29. Report from the Committee, loc.cit., p.xxxv.

Supreme and circuit courts at present are, suitors can, when so disposed, combine, in a great degree, the cheapness of a local inquiry into facts, with the advantage of a more remote but, at the same time, a more satisfactory determination of the law. Your Committee are disposed to question whether the inhabitants of Albany would exchange these advantages for a single judge, even with an appeal to Cape Town. But were this otherwise, your Committee could not recommend that so large an addition to the charge of administering justice should be made for the sake of placing any one frontier district, however important, in a position from that of every other.'

Although it is clear from the evidence that the majority of the Bench and the Bar were in favour of stationing a judge in the Eastern districts of the colony, serious doubts had been raised as to the wisdom of reducing the Supreme Court Bench to two judges. Even the redoubtable Judge Menzies, who was strenuously opposed to the plan, stated that it would be preferable to increase the Bench to five judges, and to station two of them in the Eastern districts, rather than to 'break up' the Supreme Court.³⁰ Unfortunately for the protagonists of a resident court in the Eastern districts, the recommendation was linked to the overall plan for the decentralization of the Supreme Court.

The overall plan, which made provision for two resident judges in the Eastern districts, was adopted by the Legislative Council. It was warmly received in the Grahamstown Journal,³¹ and elicited the following enthusiastic comment;³²

30. Addenda to the Report, loc.cit., Enclosures, p.4.

31. Grahamstown Journal, 9 and 16 October 1845.

32. Grahamstown Journal, 10 January 1846.

'The very circumstance of establishing a permanent court in the towns selected, will itself lead to an increased expenditure of money in them, and create fresh demands for the produce of the neighbouring farms. In time these towns will become of importance like country towns in England. Their population will naturally increase and the increased commerce of the towns will contribute to improve the country by encouraging cultivation and industry. Order and good government will be relied upon at the seat of the judge's residence, and with these liberty and security will be more perfect. These will be inducements to the more wealthy neighbours to reside in them, and by living there more extensively than on their farms, expend their surplus produce in a variety of ways beneficial to commerce and cultivation.'

From the tenor of the article, it appears that the author³³ viewed the local courts as stepping stones towards the granting of an independent government in the Eastern districts. However the Secretary for Colonies refused to allow the decentralization of the Supreme Court, and the inhabitants of the Eastern districts were denied their courts.

6.4. REPRESENTATIVE GOVERNMENT

During the period 1847-1853 demands for the establishment of a local court in the Eastern districts faded into the background and attention was focussed on the subject of representative government. The Attorney-General, who had drafted the working plan for the proposed constitution, was opposed to a federal solution and he strongly condemned the separatist cause. He was supported by the

33. Robert Godlonton, a leading separatist.

Judges, who considered separation to be inimical to the interests of the colony.³⁴ The working plan was approved by the Governor, who informed the Secretary for Colonies that the views contained in it, 'represented his own well digested opinion, and he recommended the immediate extension of "this liberal form of government" to the colony'.³⁵ The Governor's support for a unitary form of government was a 'heavy blow' to the separatists. However they soon recovered and Eastern Province Resident Associations were formed at Grahamstown and Port Elizabeth in order to oppose the plan. Corresponding committees soon sprang up in the country districts and town. The Governor, however, remained adamant and he addressed meetings at Grahamstown and Port Elizabeth, where he argued that separation could not be justified in any real sense. At a meeting in Port Elizabeth he conceded that 'judicial separation might render the administration of justice more complete in the Eastern districts', but he pointed out that it would add £10,000 to the expenditure.³⁶

When the Cape Constitutional Ordinance was eventually approved by the Privy Council on 11 March 1853, the Secretary for Colonies informed the Governor that separation into two distinct bodies could still be effected if it was found that the interests of the colony could thereby be promoted.³⁷ The Governor seized the opportunity which had been presented, and in order to stifle mounting opposition from the separatists, he recommended that a

34. British Parliamentary Papers, 1850, XXXVIII, (1137) p.29-47.

35. British Parliamentary Papers, loc.cit., p.3. Letter dated 29 July 1848.

36. Eastern Province Herald, 21 October 1848.

37. T.E.Kirk, Self-government and Self-defence in South Africa : The Inter-relations between British and Cape Politics 1846-1854, Oxford, 1972, p.468.

Lieutenant-Governor and Solicitor-General should be appointed for the Eastern districts. He also suggested that one or two resident judges should be appointed in order to improve the administration of justice in the territory. He was convinced that these measures would ensure that 'the wants of the Eastern parts would be sufficiently provided for without the removal of the seat of government and legislature or division of the colony'.³⁸ The Secretary for Colonies approved the recommendations, and in December 1853 the Governor reported that John Watts Ebdon had been offered the Solicitor-Generalship.³⁹

6.5. SIR GEORGE CATHCART'S PROPOSALS

Soon after the Secretary for Colonies had approved his recommendations, Cathcart approached the judges on the feasibility of stationing one or two judges in the Eastern districts of the colony. After praising their 'patriotic exertions' in carrying out the half-yearly circuits, he referred to the 'unparalleled difficulties and inconveniences' which had to be endured, and stated the following;⁴⁰

'It would not become me to offer any suggestions, founded upon legal consideration; but (from) the vast geographical extent of this colony, distance, bad roads and time unavoidably spent in travelling, it occurs to me that the existing system of half-yearly circuit courts can only be ameliorated by a division of the duties of the judges into two circuits, one for Eastern and one for the Western Province, sim-

38. G.H. 23/22. Letter dated 14 July 1853.

39. G.H. 23/24. Letter dated 15 December 1853.

40. Cape Parliamentary Papers, A.24.-'54, p.2. Letter dated 8 December 1853.

ultaneously in operation. To accomplish this object, one or more additional puisne judges would no doubt be required. It might be a question whether one or more of these judges might not, when not on circuit, reside in the Eastern Province; and whether the circuits might not be so arranged, with advantage, that at some one period and place the circuits might be made to come into contact, so as to facilitate a conference, or even the constitution of a Court of Appeal, at some particular central place, as for instance at Uitenhage.'

6.5.1. RESPONSE FROM THE BENCH

Sir John Wylde replied that he had consulted with the judges, and that they were unanimous in agreeing to the necessity of appointing additional judges in order to carry out the recommendations;⁴¹

'Whether that be by increasing the number of judges in and of the Supreme Court, or by the establishment of a new distinct separate court of like jurisdiction, for and within the Eastern Province (to include Beaufort), and throughout the same, in each and every district, twice, at least, in every year, to hold circuit courts in and for the exercise of judicial jurisdiction; the judges of the Supreme Court holding circuits in and throughout the districts (excluding Beaufort) of the Western Province of the colony.'

He pointed out that the appointment of an additional judge to the Bench of the Supreme Court would be sufficient to meet the exigency of the onerous circuits. The judges felt, however, that the most satisfactory and effective solution would be to establish a distinct and

41. Cape Parliamentary Papers, loc.cit., p.3. Letter dated 26 December 1853.

separate court for the Eastern districts;⁴²

'With such and the like powers and jurisdiction in the Eastern Province as vested in, and still, in such case, to be exercised by the judges of the Supreme Court throughout the colony. Right of appeal from the judgments of the court of the Eastern Province might be to the Supreme Court.'

However he was of the opinion that the proposed changes would have to be sanctioned by letters patent, because, in terms of the letters patent of 23 May 1850, the Legislative Council was only authorized to exercise its powers and authority 'until the necessary proceedings for the due election of the members of the Colonial Parliament had been adopted, and no longer, and such necessary proceedings had already been carried into effect for the said election'.⁴³ He therefore concluded that the power, which had been given to the Legislative Council to make alterations to the Charter of Justice, had reverted to the Crown. Furthermore he pointed out that no direct power had been given to or vested in the Colonial Parliament, which allowed it to interfere with the Crown's prerogative in respect of the local courts or judges. Finally he stated that jurisdiction under the Cape of Good Hope Punishment Act of 1836 could only be exercised by the judges of the Supreme Court as constituted under the Charter of Justice, and that a new Act would have to be passed by the British Parliament in order to accommodate the proposed changes.

42. Cape Parliamentary Papers, loc.cit., p.4.

43. Cape Parliamentary Papers, loc.cit., p.3.

6.5.2. THE REASONS BEHIND CATHCART'S PROPOSALS

In January 1854 Cathcart disclosed the underlying reasons which had prompted him to recommend a separate court for the Eastern districts.⁴⁴ He informed the Chief Justice that he had acted in order to satisfy public opinion in the territory, and that by approving the recommendations, the British government had 'calmed much angry feeling of discontent, and deprived evil-designing political agitators of their most plausible arguments, in time to prevent unnecessary trouble and misunderstanding at a moment of canvass for the forthcoming elections'.⁴⁵

He stated that he was in favour of establishing a separate and distinct court in the Eastern districts, with a right of appeal to the Supreme Court at Cape Town, and he welcomed the opinion of the judges in this regard. He informed the Chief Justice that he would take the matter up with the British Government in order to overcome the obstacles which had been pointed out. In January 1854 he reported to the Secretary for Colonies on the progress that had been made.⁴⁶ On 28 December he had issued a notice in the Government Gazette,⁴⁷ wherein he had explained the British government's declared intention to promote measures for the more efficient administration of justice and government in the Eastern districts. He had provisionally appointed a Solicitor-General and had submitted the judges' recommendations to the Executive Council.

44. Cape Parliamentary Papers, loc.cit., p.5. Letter dated 5 January 1854.

45. Cape Parliamentary Papers, loc.cit.

46. G.H. 23/24. Letter dated 15 January 1854.

47. Cape of Good Hope Government Gazette, Notice No.56, dated 28 December 1853.

The members were unanimous in giving their approval to the plan for the creation of a separate court in the Eastern districts. They were of the opinion that the obstacles, which had been raised by the Chief Justice, were of a technical nature and could be easily overcome. However before Cathcart could take the matter further, he was recalled and the implementation of the proposals was left to his successor, Sir George Grey.

6.6. SIR GEORGE GREY'S PROPOSALS

Prior to Grey's departure for the Cape, the Secretary for Colonies informed him that the Law Officers were of the opinion that the Colonial Parliament was vested with the power to alter the provisions of the Charter of Justice.⁴⁸ They had rejected Sir John Wylde's opinion on the subject for the following reasons;⁴⁹

'That inasmuch as Her Majesty has, by Order in Council sanctioning the Ordinance of the Legislative Council of the Cape of Good Hope, made in obedience to Her Majesty's letters patent, constituted a representative Parliament in that country, with power to make laws for the peace, order and good government of the colony, we are of the opinion that power to alter and regulate the constitution and functions of the Supreme Court was vested in the Colonial Parliament. We think that such power is necessarily included in such legislative authority. And this view is confirmed by the fact that, by letters patent of 23 May 1850, Her Majesty directed that the power of making laws to regulate the Supreme Court, which by previous Charter had been vested in the Legislative Council, should not be exercised by that body after

48. Cape Parliamentary Papers, G.5. -'55, p.5. Letter dated 4 September 1854.

49. Cape Parliamentary Papers, loc.cit., p.6. Letter dated 28 July 1854.

the proceedings for the assembling of the representative Parliament had been adopted. We are of the opinion that, inasmuch as when the Crown gives a constitution and a local legislature to a colony, the Crown is held to have abandoned its legislative authority, except where it is expressly reserved, the Crown will not have a concurrent and co-ordinate authority with the Colonial Parliament in the case put by question. We are of the opinion that, in the case of the creation, as proposed, of a court for the Eastern division, such court will be within the operation of the Act of 6th and 7th William 4th, cap. 57 (Cape of Good Hope Punishment Act), and that no mention of that Act will be necessary.'

The Governor was accordingly instructed to introduce the necessary measures for the promotion of the administration of justice in the Eastern districts before Parliament. He was also referred to Cathcart's recommendation that Hendrik Cloete would be 'peculiarly fitted for a judgeship in the Eastern districts'.⁵⁰

6.7. THE BETTER ADMINISTRATION OF JUSTICE BILL OF 1855

During the 1855 Parliamentary sessions Grey introduced a Bill for the better administration of justice.⁵¹ According to the preamble, the number of judges were insufficient to hold courts 'as frequently as the wants of the inhabitants required'. In order to remedy the 'evil' and to afford the inhabitants of the Eastern Districts the benefit of a local court, two additional judges were to be appointed to the Bench of the Supreme Court. The Supreme Court was to consist of the Chief Justice

50. Cape Parliamentary Papers, loc.cit., p.5. Letter dated 4 September 1854.

51. Cape Parliamentary Papers, Annexures to the Votes and Proceedings, 1855.

and four puisne judges, and the Governor was authorized to divide the colony into two districts and to establish a court in the Eastern division. The court of the Eastern Province was to consist of any two of the puisne judges of the Supreme Court, whom the Governor would, from time to time, assign for that purpose. Provision was also made for the enlargement of the Bench should the need arise. The court of the Eastern Province was to exercise the same jurisdiction, within the Eastern districts, as that exercised by the Supreme Court. All the rules and orders of the Supreme Court were to apply to the Eastern Province court, subject to certain specified omissions, adaptations and alterations. One judge was to constitute a quorum, and where two judges presided and there was a difference of opinion, the decision of the senior judge would be taken to be the decision of the court. Provision was also made to have the proceedings removed to the Supreme Court for a final decision. The Bill provided for an appeal to the Supreme Court, and in cases of appeal the court would be deemed a circuit court of the colony. Further appeal would lie to the Judicial Committee of the Privy Council in terms of Section 50 of the Charter of Justice.

Pending actions could be brought or removed from either court on the grounds of convenience, and there was to be a reciprocal service and execution of process between the courts. The court of the Eastern Province was to

have its own registrar and sheriff, and it was authorized to admit legal practitioners who had qualified for admission to the Supreme Court. The Attorney-General would continue to exercise the right of prosecution in the Eastern districts, but this right could also be exercised by the Solicitor-General, or by any person appointed by the Attorney-General. In the Eastern districts, circuit courts would stand in the same relation to the court of the Eastern Province as they stood to the Supreme Court in the rest of the colony. Finally the Bill provided that, as soon as the court of the Eastern Province commenced business, the Supreme Court would cease to exercise jurisdiction in the Eastern districts.

The Bill, which had been drafted by the Attorney-General, was defeated by twenty votes to ten.⁵² It was argued that the Bill either went too far or not far enough, and many thought that a second court was undesirable.⁵³ Le Cordeur suggests that it was defeated as a result of 'Western and Midlands opposition and a conflict between the two houses over their respective powers in relation to appropriate Bills'.⁵⁴ The Attorney-General, who had advised the Easterners 'to obtain as many local institutions as they could to pave the way for a future localisation of government in the East',⁵⁵ was directed to draft a new Bill in order to make provision for the appointment of an additional judge. The Bill, which was

52. Cape Parliamentary Papers, Votes and Proceedings of the House of Assembly, 1855.

53. J.R.Putzel, William Porter and Constitutional Issues at the Cape 1839-1875, Unp. M.A. thesis, UCT, 1942, p.145.

54. Le Cordeur, op.cit., p.287.

55. Putzel, op.cit.

passed and promulgated on 8 June 1855, entered the Statute Book as the Better Administration of Justice Act.⁵⁶

6.8. THE BETTER ADMINISTRATION OF JUSTICE ACT OF 1855

The Better Administration of Justice Act,⁵⁷ which was introduced as an alternative to the failed Bill, merely provided for the appointment of an additional judge to the Bench of the Supreme Court.⁵⁸ Although it was aimed at relieving the pressure of the circuit court business, the Bench continued to function as a three judge court until 1858. Soon after the Act had been passed, Sir John Wylde suffered a stroke and was obliged to retire. Hendrik Cloete was appointed third puisne in December 1855, but owing to the poor state of the colony's finances, the post of Chief Justice was kept vacant until 1858, when it was permanently filled by Sir William Hodges. The Act, which had failed to assuage the separatists, remained ineffectual and nothing could be done to remedy the 'evils' until the Bench reached its intended strength in 1858. It now became possible for the Governor to tackle the problem in earnest, and, contrary to the advice of the judges, he introduced a third circuit in 1859. However this proved to be unworkable and it was clear that some other solution had to be found.

6.9. TWO FURTHER BILLS

56. Act No. 10 of 1855.

57. Act No. 10 of 1855.

58. Section 2-4.

Notwithstanding the relief which had been afforded by the appointment of an additional judge, the problems encountered by the system of circuit courts persisted, and two further Bills were unsuccessfully introduced to Parliament before a satisfactory solution could be found.

6.9.1. POTE'S BILL

In 1863 Charles Pote, a Grahamstown resident and member of the Legislative Council, took up the Eastern cause and introduced a private member's Bill which made provision for the establishment of local courts at Grahams-town and Graff-Reinet.⁵⁹ Although the Bill was subsequently withdrawn, the Council passed a resolution recommending that an additional judge be appointed to the Supreme Court Bench. This prompted the Governor to take the matter up with the judges.

6.9.2. SIR PHILIP WODEHOUSE'S PROPOSALS

On 21 January 1864 Wodehouse requested the judges to consider and report on his proposals for the better administration of justice.⁶⁰ He proposed to abolish the Cape Supreme Court, and in its place, he intended to establish two separate courts for the Eastern and Western divisions of the colony. Each court was to consist of a Chief Justice and two puisne judges. In addition he intended to establish an Appeal Court, which was to consist of five

59. Cape Parliamentary Papers, Votes and Proceedings of the Legislative Council, 1863.

60. Cape Parliamentary Papers, A.4. -'64.

or six of the divisional court judges.

6.9.2.1. SIR WILLIAM HODGES' OPINION

Sir William Hodges was convinced that there was an urgent need to reform the judicial system.⁶¹ He pointed out that during the 1863 circuit, he had visited twenty-one circuit towns and had been absent from Cape Town for four months and seven days. He stated that the mental and bodily labour had been most severe, and that he was apprehensive about making a similar journey. He felt that there was a need for the more frequent trial of civil cases in the Eastern districts and referred to the 'great grievance' which had arisen there, because provisional sentence cases, insolvency applications and similar matters had to be referred to Cape Town. However he stated that it would be most inexpedient to abolish the Supreme Court, and he was opposed to the creation of a Court of Appeal on the grounds that it would occasion delay, expense and extreme inconvenience.

He recommended, instead, that the following proposals should be adopted :⁶²

1. The addition of one judge to the Supreme Court, which would then consist of the Chief Justice and four puisne judges.
2. The stationing of two of the puisne judges in one of the major towns of the Eastern districts.
3. One of the Eastern judges to be required to hold quarterly criminal sessions at Graaff-Reinet, Port Elizabeth, Grahamstown and any other places which the Governor deemed necessary.

61. Cape Parliamentary Papers, loc.cit., p.1. Letter dated 8 February 1864.

62. Cape Parliamentary Papers, loc.cit., p.2.

4. The Eastern districts, excluding the towns where quarterly sessions were to be held, to be divided into two circuits, and one of the resident judges to travel these circuits twice every year, or more often, if the circumstances required it.
5. Applications in insolvency for arrests, the detention of ships and other similar matters to be made to either of the two Eastern judges.

Judge Cloete was content to express his entire concurrence with the views and suggestions expressed by the Chief Justice.

6.9.2.2. JUDGE BELL'S OPINION

Judge Bell had no doubt that it would be desirable to establish a court in the Eastern districts.⁶³ However he felt that the proposed court should be equal and independent of the Supreme Court, and he rejected the Chief Justice's proposals on the following grounds;⁶⁴

'It would, in fact, give the name of a court without the thing. Though in Cape Town, two judges form a quorum, whose judgments can be reviewed only by the Privy Council; in the Eastern Province, two judges would possess only the authority of one judge on circuit, whose judgments are liable to review by the Supreme Court in Cape Town, and only ultimately to the Privy Council. A court, so subordinate in position and in action, would lack for its members the incentives to the utmost exercise of their judicial facilities from a consciousness, that the ultimate responsibility did not rest with them, and would fail to secure for itself the dignity and respect by the public, which, to be effective, every court should possess. If the members of the court were changed from time to time by the occasional introduction, for a time, of other members of the Supreme

63. Cape Parliamentary Papers, loc.cit., p.3. Letter dated 13 February 1864.

64. Cape Parliamentary Papers, loc.cit., p.4.

Court from Cape Town, the court would never gain for itself any character whatever, and if the members were made permanent, the court would soon lapse into a local institution, possessing only a little more authority and respect than the local magistracy; while the expense to the public would be but little short of what the independent court would cost.'

Bell pointed out that if the Governor's proposals were accepted, there would be very little danger that a silent growth of conflicting systems of law and practice would arise, because the systems would neither be opposed to, nor entirely different from each other. He stated that 'they would only differ in so far as divergence from the already existing system might be occasioned by different judges carrying out that system according to their separate views'.⁶⁵ However he felt that if the unity of the law was more important than a concession to the demands of the Eastern Province for the establishment of a court there, 'then the boon should not be conceded'.⁶⁶ Nonetheless he pointed out that the existence of two courts under one government would serve to diminish the evil of diverging laws and practice, and he stated that Parliament could always modify the 'judge made law of either court'.⁶⁷ Furthermore he suggested that the danger of conflicting laws and practice arising between the two Provinces could also be avoided in the constitution of the two courts.

He proposed that the Eastern Province court should be composed of two judges, and in the event of a difference of opinion arising between them, the parties should have the

65. Cape Parliamentary Papers, loc.cit.

66. Cape Parliamentary Papers, loc.cit., p.5.

67. Cape Parliamentary Papers, loc.cit.

right of having the dispute reheard by a court consisting of three judges. The three judge court would be composed of the two Eastern Province judges and one of the judges from the Western Province;⁶⁸

'Who might either be the circuit judge of the Province, who could arrange his circuit, so as to make the place of rehearing as it were one of his circuit towns, which he could always do, as the cases for rehearsing might be known before he fixed his circuit days; or if this were not found to be practical, the judge could make a journey express to the rehearing town, once or twice a year.'

According to Bell, this arrangement would remedy the supposed or real inconvenience of conflicting systems of law springing up in the courts of the two provinces. He further suggested that vacancies on either Bench could be filled from the other, and he was confident that the Eastern Province court would attract a competent Bar.

He was opposed, however, to the establishment of a Court of Appeal on the grounds that it would prove to be a 'clog and an expense', and would serve the interests of the rich litigants to the detriment of the poor.⁶⁹ He was in favour of having a direct appeal from the Eastern court to the Judicial Committee of the Privy Council.

6.9.2.3. JUDGE WATERMEYER'S OPINION

Judge Watermeyer was of the opinion that the proposition to establish two Supreme Courts involved a question of a

68. Cape Parliamentary Papers, loc.cit.

69. Cape Parliamentary Papers, loc.cit., p.6.

political nature, which as a judge, he was not competent to answer.⁷⁰ Nonetheless he pointed out that the proposals departed materially from the principles enumerated by the Secretary for Colonies in 1846, when he had stated that;⁷¹

'Among the stable (if not immutable) principles of the Judicial System at the Cape of Good Hope, I regard the maintenance at the Capital of a Supreme Court exercising jurisdiction as extensive as are the limits of the Colony.'

Watermeyer pointed out that if the government implemented the proposals, there would no longer be a Supreme Court in the colony, and he stated that 'the silent growth of conflicting systems of law and of judicial practice' would be certain.⁷² He explained that the proposal to establish superior courts, which did not have jurisdiction throughout the colony, was wholly at variance with the English system. In his opinion no Court of Appeal, however constituted, could supply the defect of original jurisdiction. Furthermore it would not be possible to obtain the benefit of a 'superior and educated Bar', because its members would be split between the two local courts.⁷³ He pointed out that the privilege of having a direct appeal to the Judicial Committee Council would be taken away. In its place there would be substituted, in the first instance, an appeal from a court consisting of three judges to another court consisting of the same judges and three others of equal authority. In his opinion, 'no Court of Appeal consisting of six judges of the proposed two Supreme Courts, or of any less number of them, could fitly perform

70. Cape Parliamentary Papers, loc.cit., p.6. Letter dated 10 February 1864.

71. Cape Parliamentary Papers, loc.cit., p.7.

72. Cape Parliamentary Papers, loc.cit.

73. Cape Parliamentary Papers, loc.cit., p.8.

the functions of a Court of Appeal'.⁷⁴ He stated that further appeal to the Privy Council would become 'very cumbersome, expensive, and might become very oppressive'.⁷⁵

He suggested that the administration of justice could be improved without having to abolish the Supreme Court. In his opinion the many inconveniences to which both the Bench and the Bar were exposed, could be obviated by a more equal distribution of the circuits. He was in favour of introducing three circuits per year, and stated that a fifth judge would amply supply any need that might arise. According to this plan, the work of the Supreme Court would, at all times, be performed by three judges, and the remaining two would be free to take the circuits. The circuits could be more evenly distributed, and they could be held three times, or twice a year, according to the requirements of the colony. He suggested that the Supreme Court terms could be reduced from four to three per year, so as to enable the circuit Bar to have their fair share of the Supreme Court practice. Finally he suggested that regular out of term chamber sittings could ensure that the litigants would suffer no hardship as a result of the reduction in the number of terms.

6.9.3. GOVERNOR WODEHOUSE'S BILL

Notwithstanding the objections of three of the four judges, Wodehouse introduced a Bill in the Legislative Council,

74. Cape Parliamentary Papers, loc.cit.

75. Cape Parliamentary Papers, loc.cit.

which embraced his original proposals for improving the administration of justice.⁷⁶ The Bill made provision for the establishment of a Supreme Court of the Eastern Districts of the Cape of Good Hope. It was to be composed of a Chief Justice and two puisne judges, and would exercise exclusive jurisdiction within the Eastern districts of the colony. Provision was also made for the creation of an Appeal Court, which was to be composed of five judges. The Appeal Court judges were to be selected from the judges of the two Supreme Courts. Civil appeals would be allowed in cases where the sum in dispute exceeded £250, and there would be a further right of appeal to the Privy Council.

The Bill, which had been published in the Government Gazette, aroused a great deal of opposition. Petitions opposing the Bill were received from Graaff-Reinet⁷⁷ and Cape Town.⁷⁸ The Graaff-Reinet petitioners objected to the Bill on the grounds that it did not make provision for the appointment of a resident judge at Graaff-Reinet, and that it therefore did not afford the Midlands division sufficient relief. The Cape Town petitioners objected to having the Supreme Court broken up, and they stated that it would be preferable to appoint an additional judge and to rearrange the circuits.

When Parliament met for the first and only time at Grahams-town on 13 June 1864, the Governor announced that the

76. Cape of Good Hope Government Gazette, 8 April 1864.

77. Cape Parliamentary Papers, A.7. -'64, Petition dated 17 May 1864.

78. Cape Parliamentary Papers, loc.cit., Petition dated 7 June 1864.

government had decided to withdraw the Bill because of the opposition which had been mounted against it. The members were informed that a new Bill would be introduced at a later date. A vote was taken and the Bill was withdrawn by a majority of two votes.⁷⁹ The Grahamstown press poured out its wrath on the Grahamstown member,⁸⁰ who had voted in favour of having the Bill withdrawn. It was pointed out that if he had voted with the other Eastern representatives, the members in the division would have been equal, and the Speaker would, according to custom, have given a casting vote for the continued consideration of the Bill. It was stated that the unfortunate representative had;⁸¹

'Taken his conceit for his conscience and his interest for a duty by not voting with the side of every white man, with scarce an exception in his district.'

However according to the Zuid Afrikaan, nobody would have been satisfied with the Bill, because the Western Province was against the principle of two Supreme Courts, the Midland districts were not satisfied with it and Port Elizabeth was jealous of Grahamstown being the seat of the Supreme Court.⁸²

6.10. THE CREATION OF THE EASTERN DISTRICTS COURT

Parliament reassembled at Cape Town and the Governor introduced the new Bill which provided for the creation of a Court of the Eastern Districts of the Cape of Good Hope. The Cape Supreme Court Bench was to be increased

79. Cape Parliamentary Papers, Votes and Proceedings of the House of Assembly, 1864.

80. John Cyprian Thomas.

81. Putzel, op.cit., p.136.

82. Zuid Afrikaan, 20 June 1864.

to five judges and two of them were to be assigned to the Eastern Districts Court. The court was to be sited at Grahamstown and one of the judges would conduct the Eastern circuits. The Supreme Court would continue to exercise concurrent jurisdiction in the Eastern districts and appeals from the Eastern circuit were to go direct to Cape Town. There would also be a right of appeal to the Supreme Court against the civil judgments of the Eastern Districts Court. In the event of a difference of opinion arising between the two Grahamstown judges, the case could be removed to Cape Town for final determination. The Bill also provided for the appointment of a Solicitor-General, with duties analogous to those of the Attorney-General.

The member for Graaff-Reinet⁸³ was also given leave to introduce a private member's Bill on the same subject. The Bill differed from the government Bill in that it provided for two resident judges, one of whom was to be stationed at Graaff-Reinet and the other at either Grahamstown or Port Elizabeth. However the Attorney-General objected to the Bill on the grounds that the judges would be exposed to 'local influences and gossip', and that the proposed courts would not be able to attract a Bar.⁸⁴ He appealed to the members 'to throw party feelings aside' and to unite in giving their support to the government Bill.⁸⁵ The Cape Argus also rejected the private member's Bill on the grounds that it would merely

83. Richard Rutherford.

84. Putzel, op.cit.

85. Putzel, op.cit.

Provide for more frequent circuits.⁸⁶ The Grahamstown Journal gave its support to the government Bill and stated that;⁸⁷

'His Excellency must have seen by this time that it is useless to try any more experiments in Parliament and what is now required is not an experiment, but a decisive act, which it is hoped His Excellency will have the courage to perform.'

The government Bill was passed, and on 26 July 1864 it entered the Statute book as Act No.21 of 1864. However the subordinate nature of the court gave birth to a long-lived grievance;⁸⁸

'That the judges at Cape Town, of no higher status, sat in judgment on their brethren in the East, but themselves were subject to check only by the Privy Council.'

86. Cape Argus, 21 June 1864.

87. Grahamstown Journal, June 1864.

88. Hahlo and Kahn, South Africa : The Development of its Laws and Constitution, London : Stevens; Cape Town : Juta, 1960, p.209.

ANNEXURE 8

Circuit Route round the Colony. Also Routes which would be travelled if an Eastern and Western Circuit were established to be performed by separate Judges.

1st

From Cape Town to Swellendam	27	hours	by Wagon
George	23	do.	
Uitenhage	50	do.	
Grahamstown	26	do.	
Somerset	22	do.	
Cradock	20	do.	
Graaff-Reinet	17	do.	
Colesberg	18	do.	
Beaufort	37	do.	
Patats River	31	do.	
Worcester	18	do.	
Cape Town	23	do.	
Total	312	hours	

2d

From Cape Town to Swellendam	27	hours	by Wagon
George	23	do.	
Swellendam	23	do.	
Worcester	13	do.	
Cape Town	33	do.	
Total	109	hours	

From Grahamstown to Cradock	41	hours	by Wagon
Colesberg	19	do.	
Beaufort	37	do.	
Graaff-Reinet	23	do.	
Somerset	21	do.	
Uitenhage	32	do.	
Grahamstown	26	do.	
Total	199		
Add	109		
Total of both Circuits	308	hours	

3d

From Cape Town to Swellendam	27	hours	by Wagon
George	23	do.	
Keur Fontyn	23	do.	
Beaufort	23	do.	
Patats River	31	do.	
Worcester	18	do.	
Cape Town	23	do.	
Total	168	hours	

From Grahamstown to Cradock	41	hours	by Wagon
Colesberg	19	do.	
Graaff-Reinet	23	do.	
Somerset	21	do.	
Uitenhage	32	do.	
Grahamstown	26		
Total	162		
Add	168		
Total of both Circuits	330	hours	

CHAPTER SEVEN

7. MATURITY

7.1. INTRODUCTION

The period of maturity commenced on a happy note with the opening of the Eastern Districts Court at Grahamstown in 1865. However it soon became evident that the court was merely a tributary and that the real power lay in the Supreme Court at Cape Town. Its own judgments and those of its circuit courts had to be taken on appeal to Cape Town, and when the two judges presided together, there was always the possibility that they would disagree and that judgment would be denied. It was also discovered that the court did not possess jurisdiction to review sentences imposed by the resident magistrates. However the latter omission was remedied by an Act of Parliament in October 1865.

Across the border in neighbouring British Kaffraria a Supreme Court had been in existence since 1862. When the Kaffrarian territory was incorporated into the Cape Colony in 1866, the court was absorbed by the Eastern Districts Court, and a place had to be found for the former Kaffrarian judge. However instead of enlarging the Eastern Districts Bench, the government removed one of the judges and replaced him with the Kaffrarian judge. This

fuelled the discontent and the Easterners began to press their demands for a court equal in status to the Supreme Court.

The government refused to yield and attention was shifted towards the granting of responsible government. After much difficulty, the colony achieved responsible government in 1872 and the Attorney-General joined the cabinet. The incumbent was soon elevated to the Bench, and became the first colonial born Chief Justice to occupy the office since the Charter of Justice.

During the period 1865-1878, the character and composition of the Bench changed completely. Connor and Denijssen¹ were appointed judges of the Cape Supreme Court, and they were assigned to the Bench of the newly created Eastern Districts Court. Judge Cloete retired on pension in October 1865. Fitzpatrick was appointed to the Eastern Districts Bench in 1866, and Judge Connor was obliged to return to Natal. However when Judge Watermeyer died in 1867, Connor was recalled to act in his place. In 1868 Hodges died and Judge Bell was appointed Chief Justice. Connor returned to Natal and the vacancy on the Supreme Court Bench was filled by Judge Dwyer. Judge Denijssen was transferred to Cape Town and Advocate Cole was given an acting appointment at Grahamstown. In 1869 Judge Fitzpatrick joined Bell and Denijssen at Cape Town. Judge Dwyer was assigned to Grahamstown, where he was

1. Also spelt as Denyssen.

joined by Judge Smith, and Cole went back to practice. In 1873 Bell suffered a stroke and the Attorney-General was appointed Chief Justice. In 1877 Judge Denijssen retired and his seat at Cape Town was filled by Judge Dwyer. In 1878 the vacancy at Grahamstown was filled by Judge Barry, the former Recorder of Griqualand West.

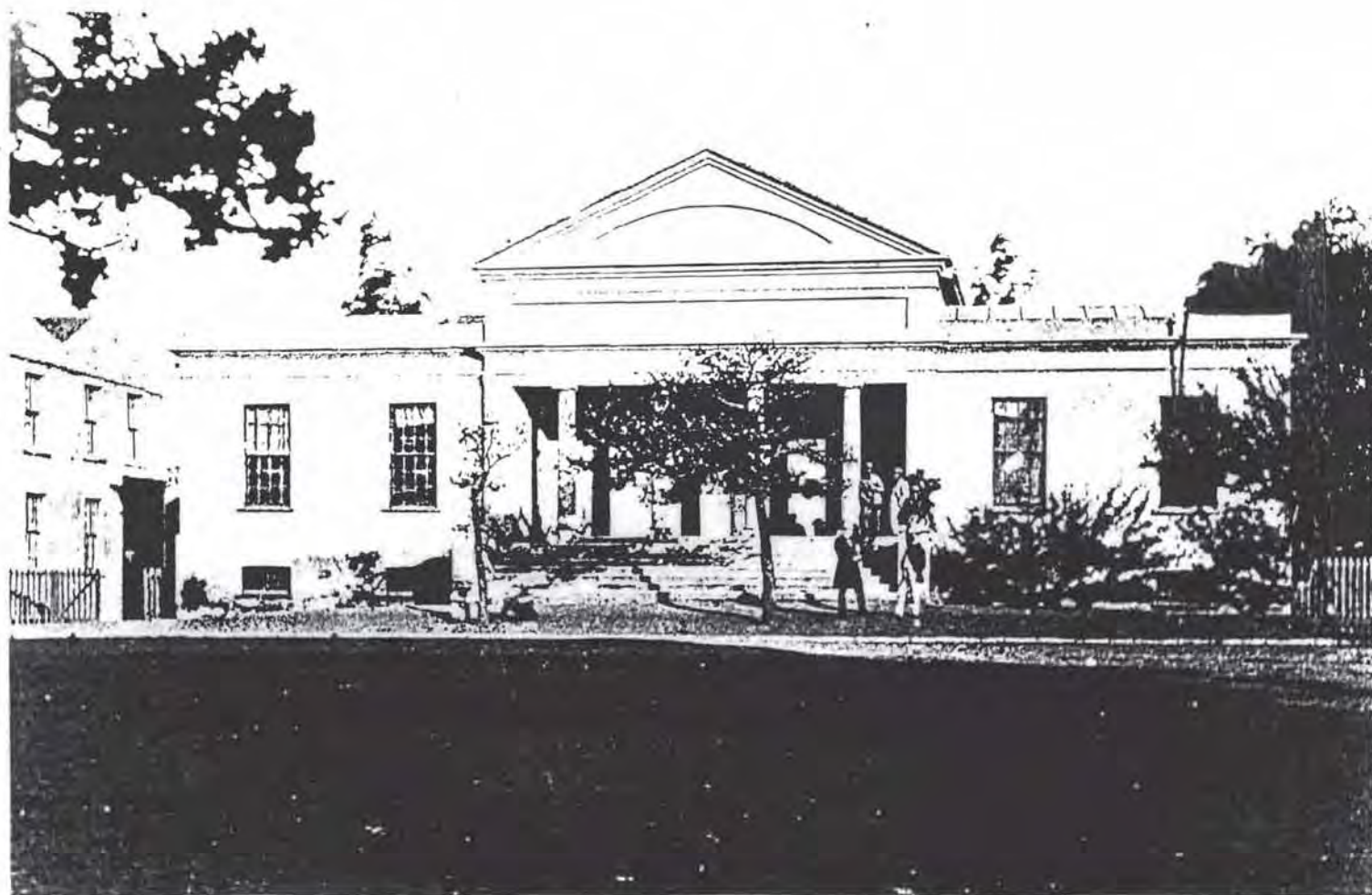
In 1874 the Civil Jury Trials Act was amended, and the new Act provided that juries would only sit when requested by either side.² A far more important development took place in the same year, when a Commission was appointed to consider the constitution of the courts, and the general administration of justice. However the members of the Commission were unable to reach agreement over the future of the Eastern Districts Court. The majority of the members were in favour of dismantling the court. They were vigorously opposed by the minority, who wanted the Bench to be increased to three judges, with jurisdiction equal to that of the Supreme Court. The only immediate outcome of the inquiry was an Act³ which allowed a single judge, during vacation, to hear civil matters. In the following year, all restrictions to the right of appeal to the Supreme Court, in criminal cases arising in the magistrates' courts, were lifted.⁴

Significant developments were also taking place in the field of judicial precedent. Although Judge Watermeyer

2. Act No. 7 of 1854; as amended by Act No. 30 of 1874.

3. Act No. 23 of 1875.

4. Act No. 21 of 1876.



THE EASTERN DISTRICTS COURT

had compiled a volume of law reports in 1857, the first real breakthrough occurred in 1870, when the Menzies' Reports were published in three volumes. The Judicial Committee of the Privy Council was enlarged in 1871,⁵ when provision was made for the appointment of four paid members. However they were superseded in 1876⁶ by Lords of Appeal in Ordinary. In 1877 Chief Justice de Villiers referred to the importance of the Cape Supreme Court decisions, when he stated that;⁷

'The decisions of the Supreme Court of this Colony are received with as much respect in the Courts of the Republics and, if I am not misinformed, in the Courts of Natal and Griqualand West, as the decisions of their own Courts.'

7.2. THE OPENING OF THE EASTERN DISTRICTS COURT

In December 1864 the Governor issued a proclamation, wherein he stated that the Court of the Eastern Districts would be opening at Grahamstown on 4 February 1865.⁸ A suitable court house had to be found, and the Commercial Hall was selected as the venue for the new Court. The building had been erected in the 1830's, and had served as a venue for civic occasions, theatres, balls and circuit courts.⁹ In January 1865 Judges Connor and Denijssen were officially assigned to the Grahamstown Bench.¹⁰ The grand opening took place on the appointed day in the newly refurbished court house. The following description of the interior arrangements appeared in the Grahamstown Journal;¹¹

5. 34 & 35 V. c. 91.

6. 39 & 40 V. c. 59.

7. Eric A Walker, Lord de Villiers and his times in South Africa 1842-1914, London : Constable, 1925, p.77. Letter dated February 1877.

8. Cape of Good Hope Government Gazette, Proclamation No.63, 21 December 1864.

9. J.D.Cloete, A Chronicle to mark the Centenary of the Eastern Cape Division of the Supreme Court, Grahamstown, 1965, p.6.

10. Cape of Good Hope Government Gazette, Proclamation No.4, 28 January 1865.

11. Grahamstown Journal, 6 February 1865.

'The arrangements of the hall were about the same as usual. A second desk had been placed on the judges' platform, and the fittings had been painted anew. Cobwebs and dust, as a matter of course, had been swept out with other mouldy reliques of the past, by new brooms. The windows, also, had been well polished, and let the clear sheen of a good day come in upon the reformed court.'

At about quarter to ten, the mayor and the entire town council entered the packed court house. The registrar, Mr. Huntly, and the judges' clerks, Messrs. Merriman and Fleck, had taken their seats at a large table immediately below the Bench. The Bar was represented by advocate de Wet, and the Side Bar by attorneys Ayliff, Wright, Arbouin, Coryndon and Jeffries. Immediately after the judges had taken their seats, the registrar read the proclamations constituting the court and appointing the judges. He then declared the court to be duly opened. The mayor was then invited to address the Bench. He informed the judges that the establishment of the court was greatly appreciated by the inhabitants, and he stated that the evils which had been occasioned by the great distance from the Supreme Court and by the tedious and protracted circuits would now be removed.¹² The judges delivered a suitable response, and Judge Connor instructed the registrar to read the petitions of the practitioners who were applying for admission. Advocate de Wet, attorneys Ayliff, Wright, Arbouin, Coryndon, Stone and Carlisle were duly admitted. A number of rules were promulgated and the court adjourned.

12. Grahamstown Journal, loc.cit.

On 14 February 1865 Simeon Jacobs, the Attorney-General of British Kaffraria, was admitted as an advocate. After W.M. Innes, W.C. Elliott and E.S.L. Gilfillan had been admitted as attorneys, advocate de Wet brought an application for the appointment of a commissioner at Cape Town, in order to obtain evidence from certain persons connected with an insolvent estate. Judge Connor, however, questioned whether the court had jurisdiction in the matter, and he stated that even if the court had the power, 'it should be very slow to travel beyond its own jurisdiction'.¹³ Judge Denijssen added that the Eastern Districts Court had no jurisdiction beyond the districts which had been defined in the Act constituting the court. The editor of the Grahamstown Journal lost no time in bringing the matter to the attention of his readers, and on the following day the paper carried an editorial on the subject of the court's jurisdiction. The editor stated that the issue deserved to be noticed on the following two grounds;¹⁴

'First, it is of interest as occurring on the first day of the new court's working life; and second, it suggests the possibility of a far too frequent recurrence of difficulties of a like kind, from the rules and orders of court, and Acts of Parliament, made and passed before the creation of the Court of the Eastern Districts, applying specially to the Supreme and circuit courts, and to none others.'

The editor concluded his editorial by predicting that the judges would have a difficult time until the Eastern Dis-

13. Grahamstown Journal, 15 February 1865.

14. Grahamstown Journal, loc.cit.

tricts Court had been weighed in the balance, 'and its merits discovered, and its demerits remedied'.¹⁵ However the court had already been weighed in the balance, and the scales had been fixed by the Secretary for Colonies when he had directed that 'the supremacy of the Supreme Court at Cape Town had to be the stable (if not immutable) principle of the judicial system'.¹⁶

The Act¹⁷ establishing the Eastern Districts Court had left no doubt that the legislators had intended to retain the supremacy of the Supreme Court. Firstly the jurisdiction of the Supreme Court ran throughout the colony, whereas the jurisdiction of the Eastern Districts Court was limited to the following districts;¹⁸

Albany	Humansdorp
Albert	Middleburg
Alexandria	Murraysburg
Aliwal North	Peddie
Bathurst	Port Elizabeth
Bedford	Queenstown
Colesberg	Richmond
Cradock	Stockenstrom
Fort Beaufort	Somerset
Graaff-Reinet	Uitenhage
Hopetown	Victoria East

Secondly appeals from the judgments of the Supreme Court went directly to the Judicial Committee of the Privy Council, whereas appeals from the Eastern Districts Court lay,

15. Grahamstown Journal, loc.cit.

16. G.H. 1/180. Letter dated 4 December 1846.

17. Act No. 21 of 1864.

18. Schedule to the Act.

in the first instance, to the Supreme Court.¹⁹ Thirdly the Supreme Court retained the exclusive right to hear appeals from the circuit courts.²⁰ Fourthly when the two Eastern Court judges were unable to reach agreement, provision was made to have the cases referred to the Supreme Court for final determination.²¹ Finally the Act had omitted to give the Eastern judges jurisdiction to review the sentences imposed by the resident magistrates.²² The omission, however, was clearly due to an oversight, and in October 1865 Parliament passed an Act²³ whereby the judges of the Eastern Districts Court were given exclusive jurisdiction to review sentences imposed by magistrates resident in the Eastern districts of the colony. However the legislators were not prepared to sever the tributary, and the disgruntled Easterners had to make do with a subordinate court. According to the following Table, the subordinate nature of the court did not unduly restrict its business :²⁴

Civil and Criminal Business brought before the Eastern Districts Court and the Circuit Courts of the Eastern Districts during the Twelve month period ending 31 May 1866

Civil cases brought before the Eastern Districts Court	745
Criminal cases " " " " "	47
Surrenders accepted by the Eastern Districts Court	148
Civil cases brought before the circuit courts	360
Criminal cases " " " "	375

When the neighbouring territory of British Kaffraria was in-

19. Section 25.

20. Section 38.

21. Section 24.

22. Act No.20 of 1856 provided that where a magistrate imposed a sentence of imprisonment exceeding one month, or a fine exceeding £5, or more than 12 lashes, the record had to be forwarded to the Supreme Court for review by one of the judges.

23. Act No.10 of 1865.

24. Data obtained from a return compiled by the registrar of the court.

corporated into the colony in April 1866,²⁵ the Eastern Districts Court took over the duties of the Kaffrarian Supreme Court. The British Kaffrarian Incorporation Act provided for the following;²⁶

'From and after the incorporation..., the Supreme Court of British Kaffraria existing at the time of such incorporation, and all laws, rules and regulations regulating or affecting the trial of suits therein, shall cease and determine; and the districts of the resident magistrates comprising that part of the colony formed by such incorporation shall be added to the districts of resident magistrates in and over which "the Court of the Eastern Districts of the Cape of Good Hope" has and exercises the certain concurrent jurisdiction by the "Administration of Justice Act, 1864", conferred upon the said court; which court, proceeding according to the rules and orders thereof, shall have jurisdiction in and over all causes arising and persons residing and being within any of the districts hereby added to the certain other districts aforesaid, precisely as if the districts so added had been included in the schedule to the Administration of Justice Act, 1864.'

7.3. THE SUPREME COURT OF BRITISH KAFFRARIA

7.3.1. INTRODUCTION

On 23 December 1847 the Cape Governor, Sir Harry Smith, proclaimed the territory between the Keiskamma and the Kei rivers a separate British Dependency under the name British Kaffraria.²⁷ The Secretary for Colonies had originally intended to annex the territory to the Cape Colony, but it was pointed out that 'the legal system would have

25. Cape of Good Hope Government Gazette, Proclamation No.30, dated 17 April 1866.

26. Act No.3 of 1865, Section 6.

27. A.E.du Toit, The Cape Frontier : A study of Native Policy with special reference to the years 1847-1866, Archives Year Book for South African History, vol.1, 1954, p.23.

to be different from that of civilized peoples as the institution of civilization would be unsuitable to barbarous tribes'.²⁸ On 16 December 1850 letters patent were issued for the purpose of constituting the territory into a separate colony, but no further action was taken and the letters patent were allowed to lapse.²⁹ Fresh letters were issued on 7 March 1854, but once again no further action was taken until East London was reincorporated into the territory.³⁰

In the meantime Sir Harry Smith had appointed Colonel Mackinnon as the commandant and chief commissioner of the territory. Three commissioners were appointed to assist Mackinnon,³¹ and the tribal chiefs were given recognition according to customary law. An appeal lay from the tribal courts to the commissioners, who could set aside the tribal court judgments when they were 'inconsistent with justice and humanity'.³² The white inhabitants, however, were subject to the Mutiny Act, since the territory was ruled by Martial Law.³³ They were also required to obey the Regulations for Civilians which were issued from year to year.

In October 1857 a special criminal court was set up for the trial of persons accused of murder, culpable homicide and other serious crimes.³⁴ The court, which was composed of five members, was given jurisdiction over all persons within the territory.³⁵ British subjects,

28. du Toit, *op.cit.*, p.21.

29. Cape Parliamentary Papers, A.2.-'63, p.7. Letter dated 30 April 1862.

30. The port of East London had been annexed to the Cape in 1847.

31. John Maclean, W.M.Fynn and Charles Brownlee.

32. du Toit, *op.cit.*, p.94.

33. John Benyon, Proconsul and Paramouncy in South Africa, Durban : University of Natal Press, 1980, p.66

34. The court sat for the first time on 24 November 1857.

35. du Toit, *op.cit.*, p.103.



PREMISES OCCUPIED BY THE KAFFRARIAN
SUPREME COURT

however, could be removed to the Cape Colony for trial under the Cape of Good Hope Punishment Act. By 1859 the settler population had grown to approximately 6000 residents, and there was an urgent need to place the judicial system on a sound basis.

The Cape Governor requested the Cape Parliament to incorporate the territory. Parliament declined the offer, and it was agreed that East London should be returned to the territory. On 12 April 1860 the Secretary for Colonies directed that the 1854 letters patent had to be implemented. This was done on 26 October 1860 and a Lieutenant-Governor was now appointed to administer the territory.

7.3.2. THE ESTABLISHMENT OF THE KAFFRARIAN SUPREME COURT

On 21 December 1861 the Lieutenant-Governor issued an Ordinance ³⁶ which made provision for the establishment of a Supreme Court in the territory. The court was to consist of a single judge, who was required to be an English or Irish barrister, or a Scottish advocate, or an advocate of the Cape or Natal Supreme Courts. It was also possible for a locally admitted advocate to be appointed to the Bench. The judge was authorized to frame the necessary rules and orders of court, which had to be submitted to the Lieutenant-Governor for approval. The

36. Ordinance No.10 of 1861.

court was to take its seat at King William's Town and provision was made to allow the court to sit elsewhere when necessary. The Ordinance provided for the appointment of a master and a sheriff, and such other officers as the Lieutenant-Governor deemed necessary.

The Attorney-General was made an ex officio advocate of the court, which was authorized to admit advocates, attorneys and notaries. The judgments of the court could be taken on appeal to the Judicial Committee of the Privy Council when the amount in dispute exceeded £300. Civil and criminal cases had to be tried by the judge and a jury of nine men, whose verdict had to be unanimous,³⁷ and in 1864 provision was made to enable civil cases to be tried by special juries.³⁸

James Coleman Fitzpatrick was selected to be the colony's first judge, and his appointment was officially announced on 15 November 1861.³⁹ Simeon Jacobs was appointed Attorney-General,⁴⁰ and Richard Giddy and Charles Mills were appointed master and sheriff respectively. At 12 o'clock on Wednesday 12 February 1862 the court commenced business in a building which was later to be known as the Commercial Hotel.⁴¹ The Supreme Court of British Kaffraria continued to function until 17 April 1866, when the territory was incorporated into the Cape Colony. On the date of incorporation all proceedings were halted and removed to the Eastern Districts Court.⁴² Fitzpatrick was trans-

37. Ordinance No.7 of 1861, as amended by Ordinance No.5 of 1864.

38. Ordinance No.17 of 1864.

39. Government Notice No.80 of 1861.

40. Government Notice No.47 of 1861.

41. Government Notice No.5 of 1862.

ferred to the Eastern Districts Bench, and Jacobs was appointed Solicitor-General at Grahamstown. The Kaffrarian advocates were entitled to be admitted as advocates of both the Cape Supreme Court and the Eastern Districts Court, whereas the Kaffrarian attorneys were only entitled to be admitted to the Eastern Districts Court. However in 1872 the attorneys were allowed to apply for admission to the Cape Supreme Court.⁴³ The admission of the Kaffrarian practitioners was frowned upon in certain circles and it elicited the following sarcastic comment;⁴⁴

'The attorneys who had been practising at the Kaffrarian Bar were made barristers, and the Kaffrarian agents were turned into full-fledged attorneys.'

7.4. RESPONSIBLE GOVERNMENT

Events leading up to the granting of responsible government can be traced back to 1862, when the Secretary for Colonies instructed the Governor to bring about a federation of the Southern African states. Acting on these instructions, the Governor attempted to induce the Cape Parliament to incorporate British Kaffraria. However Parliament voted down the proposal as it was felt that the attainment of responsible government should first be achieved. In 1865 the British government decided to break the deadlock which had arisen as a result of the intransigence of the parliamentarians, and it passed the British Kaffrarian Incorporation Act.⁴⁵ The Cape Parliament was forced to back down, and British Kaffraria

42. Act No.3 of 1865, Section 8.

43. Act No.6 of 1872.

44. W.E.G. Solomon, Saul Solomon : The Member for Cape Town, Cape Town : OUP, 1948, p.106.

45. Act No.3 of 1865.

became an integral part of the colony in April 1866.⁴⁶ In order to demonstrate its displeasure, Parliament passed a vote of censure on the unfortunate Governor. In the following year the Governor introduced a number of unpopular fiscal measures. The House of Assembly rejected the measures and, instead, it 'sacrificed half a dozen magistrates on the altar of economy'.⁴⁷ The Governor concluded, not unreasonably, that the colony was ungovernable and he decided to amend the constitution. However his 'Jamaican' constitution was rejected and he was once again censured. The Governor promptly dissolved Parliament and appealed to the electorate to choose between the 'Jamaican' constitution or responsible government. When Parliament reconvened in 1870, the Governor's constitutional and tax proposals were summarily rejected. It was clear that the 1853 Constitution would never be able to function while Sir Philip Wodehouse governed the Cape, and he was replaced by Sir Henry Barkly in December 1870. The new Governor, 'who was a passionate advocate for self-government', supported a motion for responsible government during the 1871 Parliamentary sessions. However the Bill was rejected by a small margin. It was reintroduced in 1872 as a government measure, and was passed by a majority of one vote.⁴⁸ Under responsible government, the colony acquired a Prime Minister and an Executive Council who were responsible to the House of Assembly. The administration of justice became the sole responsibility of the colonial legislature, and the Brit-

46. Cape of Good Hope Government Gazette, Proclamation No.30, dated 17 April 1866.

47. Eric A Walker, A History of South Africa, London : Longmans Green, 1928, p.315.

48. Act No.1 of 1872.

ish government ceased to appoint the judges. The Attorney-General became the 'Minister of Justice' in all but name, and when the incumbent was appointed Chief Justice in 1873, the Supreme Court entered into a new phase of its development.

7.5. ON AND OFF THE BENCH

In September 1864 Chief Justice Hodges was granted leave to travel to England. Bell was appointed acting Chief Justice until Hodges returned in October 1865. During Hodges' absence, two new appointments were needed to set up the Eastern Districts Court. The posts were filled by Henry Connor and Petrus Johannes Denijssen. When Hodges returned, Judge Cloete retired on pension. The Bench now consisted of the Chief Justice and four puisne judges. Hodges, Bell and Watermeyer were stationed at Cape Town, and Connor and Denijssen at Grahamstown.

In May 1866 the Governor informed the Secretary for Colonies that he had granted Judge Bell leave of absence under 'rather peculiar circumstances'.⁴⁹ He stated that Bell had given notice of his intention to retire at the end of June, and he pointed out that he was entitled to an annual pension of £900. However Judge Watermeyer had approached him and had stated that Bell's retirement would be 'a severe loss to the colony'.⁵⁰ Watermeyer had suggested that Bell should be induced to continue in ser-

49. Cape Parliamentary Papers, A.6.-'67, p.1. Letter dated 14 May 1866.

50. Cape Parliamentary Papers, loc.cit., p.2. Memorandum dated 21 April 1866.

vice, and had recommended that he should be granted an extra £600 per year for five years. By then Bell would have completed 20 years service and would be entitled to retire on a pension equivalent to his full salary of £1200. Watermeyer pointed out that Bell's retirement would mean that he would gain in seniority, but he stated that he was perfectly willing to forgo the advantage if Bell's services could be retained. The matter was taken up with the Executive Council and it was agreed to recommend to Parliament that whenever a judge became entitled to a pension after 15 years service, the Governor should be at liberty to pay him an additional £300 per year for five years in order to retain his services. Bell was informed of the decision of the Executive Council and he was granted six months leave, on the condition that Judge Cloete would undertake to perform his duties without any addition to his pension.

Bell replied that Judge Cloete had agreed to take his place on the Bench without being paid any remuneration, and that he would be leaving for England on the next mail.⁵¹ However he stated that he was not prepared to commit himself to the offer of an extra £300 per year, but preferred to await the decision of Parliament on the subject. A week later he wrote to the Governor expressing doubt as to whether the proposal would meet with Parliament's approval, and he suggested that Watermeyer's recommendations should be tabled as well.⁵² He pointed out that the

51. Cape Parliamentary Papers, loc.cit., p.4. Letter dated 7 May 1866.

52. Cape Parliamentary Papers, loc.cit., p.5. Letter dated 14 May 1866.

judges' salaries had been fixed by law, and he was therefore of the opinion that Parliament would most likely refuse to sanction an arrangement which gave the Governor a discretionary power to make the judges' position better or keep it as it was. He stated that after the Pension Act had been drafted, Parliament had increased the scale, and he assumed that the pensions had been increased because;⁵³

'After twenty years' service, a judge should not, as far as salary was concerned, have any temptation to encumber, it might be, the colony with his services; pension and salary being the same.'

The more correct account, he had been told, may have been that the members thought the salaries too small, and had therefore made the pensions high as a sort of compensation. He pointed out that if the first assumption was correct, the Executive Council's recommendation would defeat the object of Parliament, because by offering to increase the judge's salary while keeping the pension low, a judge would be induced to hold on to his office after he had become unfit to discharge his duties. On the other hand, if the second account was correct, he stated that;⁵⁴

'It would hardly be even just, for it is neither more nor less than offering to a judge, after he shall have spent the best years of his life at an under salary, to give him not even the salary which, on this supposition, he ought to have had from the beginning, and out of which he might have saved a provision for his family, but merely the capacity to receive from the Governor for the time a sum which will make his salary for the time to come up to what it ought to have been for the time past, if the Governor shall see fit to give it.'

53. Cape Parliamentary Papers, loc.cit., p.6.

54. Cape Parliamentary Papers, loc.cit.

He concluded by stating that the best possible arrangement would be to raise the salaries of all the judges at once, absolutely, and without any discretion in any quarter.

Bell returned to the Cape in November, having learned in England that the Executive Council's recommendation had been disallowed by Parliament. He informed the Governor that his doubts had been justified, as the measure had been disallowed on the point which he had considered to be objectionable.⁵⁵ He pointed out that he was equally surprised to discover that the redrafted Bill, which he had found at the bottom of the orders of the day, had 'uniformly preserved the honourable position whatever change might otherwise be made in the list'.⁵⁶ He suggested that he should be granted an extra £600 per year for five years. This would mean that he would accumulate £3000, and if the sum were spread out over the preceding five years and over the approaching five years, it would constitute a salary of £1500 per year. He expressed the hope that this would constitute a precedent for raising the salaries of all the judges to £1500.

In May 1867 the Governor informed Bell that the government intended to raise the question of his salary in Parliament, and requested his opinion as to whether it should be in the form of Bill or a resolution. Bell

55. Cape Parliamentary Papers, loc.cit., p.7. Letter dated 17 December 1866.

56. Cape Parliamentary Papers, loc.cit.

replied that a resolution would be the most convenient method.⁵⁷ Although Bell succeeded in obtaining relief for himself, he was unsuccessful in his efforts to secure an improved salary for his colleagues. In August 1867 Parliament amended the Pension Act.⁵⁸ Although it preserved the status quo of the serving judges, it worsened the position for the future appointees. The latter were now only entitled to receive a pension amounting to two thirds of their salaries after having served for 15 years. Under the 1861 Act they were entitled to receive three quarters of their salaries. Furthermore the provision which allowed the judges to draw pensions equal to their full salaries after 20 years' service was deleted.

In the interim, William Porter had tendered his resignation as Attorney-General on 17 March 1866.⁵⁹ He was succeeded by William Downes Griffith. Although Griffith's name does not appear on the roll of advocates, it appears that he was admitted to practise by Judge Bell on 20 March 1866.⁶⁰ Jacob Dirk Barry acted as Solicitor-General until the post was filled by Griffith's in 1867.

Judge Connor returned to Natal in July 1866, and James Coleman Fitzpatrick took his place on the Eastern Districts Court Bench. On 21 September 1867 the Bench suffered a tragic loss when Judge Watermeyer died in London. His failing health had forced him to take sick leave early in 1867, and Judge Connor was recalled from

57. Cape Parliamentary Papers, loc.cit., p.8. Letter dated 27 May 1867.

58. Act No.2 of 1867.

59. Porter was granted a pension by special Act of Parliament in October 1865.

60. F.St.Leger, *The Hon.Mr. Justice Andries Stockenström*, *South African Law Journal*, vol.53, 1936, p.260.

Natal to act in his place at Cape Town. When Connor had initially been appointed as a judge of the Eastern Districts Court in January 1866, the Secretary for Colonies refused to confirm the appointment, because he considered it 'irregular' for a Governor to remove a judge from one colony to another.⁶¹ When the Cape Colony incorporated British Kaffraria, the Secretary for Colonies had directed that Connor had to return to Natal in order to provide a place for Fitzpatrick. According to Spiller;⁶²

'A disappointed Connor returned to Natal in July 1866, but in that year he wrote to the Secretary of State (for Colonies), applying for promotion. Fortunately for him, the Cape Governor, in March 1867, wrote to the Colonial Office, proposing that Connor act as a judge of the Cape Supreme Court during the temporary absence of Watermeyer, and that he should succeed him in the event of a vacancy, which appeared probable. The Secretary of State (for Colonies), Buckingham, now offered Connor a choice between the judgeship at the Straits Settlement, Nisabad, and the post outlined by the Cape Governor, and Connor accepted the latter.'

When Watermeyer died the Governor offered Connor a permanent seat on the Bench.⁶³ However Connor declined the appointment on the grounds that his erstwhile junior, Denijssen, would have been placed ahead of him in order of seniority, because his own appointment had only been a provisional one. He would also have been required to return to Grahamstown, which he was unwilling to do.⁶⁴ In March 1868 Connor changed his mind and accepted the offer, but the Secretary for Colonies declined the belated acceptance.⁶⁵ Connor left the Cape Bench on 6

61. Peter Robert Spiller, The Natal Supreme Court : Its Origins (1846-1858) and Its Early Development (1858-1874), Unp. Ph.d thesis, University of Natal, 1982, p.133.

62. Spiller, op.cit.

63. G.H. 23/30. Letter dated 19 November 1867.

64. G.H. 23/30. Letter dated 16 December 1867.

65. G.H. 1/319. Letter dated 12 June 1868.

August 1868 and his place was taken by Edward Dwyer.

On 17 August 1868 Sir William Hodges dies and Bell was appointed acting Chief Justice. Judge Denijssen was moved to Cape Town and Alfred Whaley Cole was given an acting appointment at Grahamstown. In December 1868 Bell was permanently appointed as Chief Justice and Denijssen became the senior puisne judge. In February 1869 Fitzpatrick was transferred to Cape Town, and Dwyer was moved to Grahamstown. Charles Thomas Smith was appointed fourth puisne judge and he replaced Cole at Grahamstown. He was the last judge to be appointed directly by the British government.

In 1871 the Attorney-General, William Downes Griffith, entered the arena of party politics when he refused to draft the responsible government Bill. Griffith was of the opinion that the colony was 'quite unfit for the change'.⁶⁶ His action highlighted the fact that, under the 1853 Constitution, the members of the Executive Council did not have to act according to the wishes of the House of Assembly. Griffith obtained a temporary leave of absence, and the task of drafting the Bill was given to the former Attorney-General, William Porter. Simeon Jacobs was summoned from Grahamstown to pilot the Bill through Parliament in his capacity as Solicitor-General. With the advent of responsible government, Griffith was obliged to resign his office, and Johan Hendrik de Villiers

66. Alfred Whaley Cole, Reminiscences of My Life and of the Cape Bench and Bar, Cape Town : Juta, 1896, p.60.

became the new Attorney-General.

On 18 August 1873 Bell suffered a stroke, but 'his natural shrewdness escaped the paralysis which had smitten him, and he refused either to take leave or to resign until he had secured what he considered to be an adequate pension'.⁶⁷ Ironically the government was now faced with the predicament which Bell had urged them to resolve in 1866. The Supreme Court Bench was reduced to two judges, and a judicial disagreement was almost certain to arise. Dwyer was summoned to Cape Town, but 'in face of the uproar raised by the Easterners, he had to be turned back at Port Elizabeth'.⁶⁸ The inevitable deadlock occurred on 22 December 1873, when Denijssen and Fitzpatrick were unable to reach agreement over a case they were trying. Bell secured his terms and retired with the desired pension. His departure signalled the end of an era in the chronicle of the Cape Supreme Court. Together with Menzies, Cloete and Watermeyer, he had helped to cement the principles of Roman Dutch Law. In the past the judges had jealously guarded the Supreme Court, and had built it into the grand fountain for the administration of justice. However its future was by no means secure, and the vacuum which had arisen on the Bench threatened to undermine both the court and the foundations of the Roman Dutch Law.

The Ministry were put 'fairly on their mettle' in their

67. Eric A Walker, Lord de Villiers and His Times : South Africa 1842-1914, London : Constable, 1925, p.65.
 68. Walker, op.cit.

endeavours to find a suitable successor to Bell.⁶⁹ According to Walker;⁷⁰

'Denijssen had little but his seniority to recommend him; Fitzpatrick and Dwyer, next in seniority, were not judges of such an outstanding character as to warrant their being promoted above their colleagues; while Smith, the fourth puisne judge, was but a recent appointment.'

There remained the two chief non-judicial officers of the colony; de Villiers the Attorney-General, and Simeon Jacobs, the Solicitor-General of the Eastern Districts Court. By English analogy de Villiers, as Attorney-General, had first claim on the vacancy. However his youth (he was only thirty-one), and the fact that he had only been called to the Bar eight years previously, weighed against him. Furthermore his appointment might have been construed as 'jobbery at the first opportunity', because the parties in the Legislative Council were evenly balanced and the Chief Justice, *as ex officio* President, held a casting vote.⁷¹ When the post was offered to him, de Villiers declined it and suggested that it should first be offered to Porter or Judge Connor. However Porter declined the honour and gave his support to de Villiers. The Prime Minister called a meeting of the Executive Council and, in de Villiers' absence, it was decided to offer him the post at the same salary which had been paid to Hodges and Bell.⁷²

De Villiers accepted the offer, and he became the first colonial born judge to achieve the highest judicial off-

69. Walker, *op.cit.*

70. Walker, *op.cit.*

71. Walker, *op.cit.*, p.66.

72. The House of Assembly had resolved to pay the next Chief Justice £1500, which was £500 less than that paid to Hodges and Bell.

ice at the Cape since the establishment of the Supreme Court. As was to be expected, 'public reaction was a mixture of approval and criticism based on his youth, alleged jobbery and alleged early milking by responsible government of its political talent'.⁷³ The inauguration was held on 9 December 1873, and took place in the following circumstances;⁷⁴

The court was crowded in anticipation of the scene. The Bar was present in full force, from the venerable Speaker, Sir Christoffel Brand, downwards. Three of de Villiers' ministerial colleagues were present to give him countenance, and as far as the Premier was concerned, to promise him much more if need be. The two puisne judges entered first. At last the new Chief Justice entered in dead silence and took charge of the situation at once. He shook hands with his brother justices and handed the registrar his commission drawn up by himself as Attorney-General, the sole substance of truth in the still current legend (1925) that he made himself Chief Justice. Bowdler, the messenger of the court, who was standing close by, always declared that de Villiers asked Denijssen to swear him in and that Denijssen muttered "Swear yourself". In any case, de Villiers did administer the oath to himself and called his first case.'

Simeon Jacobs was appointed acting Attorney-General early in December 1873. However some doubt was expressed in the press as to whether he would accept the appointment.⁷⁵ He had previously expressed an unwillingness to enter Parliament or to have anything to do with the political conflicts of the day. The matter was cleared up when it was reported that;⁷⁶

73. Ellison Kahn, Johan Hendrik de Villiers, in W.J. de Kock, *Dictionary of South African Biography*, Cape Town : Tafelberg, 1968, vol.1, p.225.

74. Walker, *op.cit.*, p.68.

75. *Cape Argus*, dated 8 December 1873.

76. M. Barnett, Simeon Jacobs, *South African Law Journal*, vol.45, 1928, p.2.

'The appointment...is a purely professional and technical one for the performance of functions which can be intermitted. As things stand at present Mr. Jacobs holds no political position at all, and although acting Attorney-General, is not an acting member of the cabinet.'

It must be pointed out that under section 3 of the Responsible Government Act,⁷⁷ Ministers were made eligible for election as members of either House of Parliament. If not so elected they could not, under section 5, sit or speak in either House. If elected they had the right, under section 4, to sit and speak in both Houses, but could vote only in the House of which they were members. Thus when Jacobs assumed office as acting Attorney-General on 24 December 1873, he had no right to sit or speak in either House. However the lure of politics proved irresistible and Jacobs was returned to the House of Assembly as the member for Queenstown in 1874. His appointment as Attorney-General was made permanent and he joined the cabinet. Jacobus Petrus de Wet succeeded Jacobs as Solicitor-General in 1874.

The new Attorney-General was soon to incur the wrath of Judge Dwyer. In April 1874 Jacobs called Dwyer to Cape Town as 'temporary Justice of Appeal', and added insult to injury by telling him that he might continue at Cape Town if he liked.⁷⁸ According to Walker;⁷⁹

'Dwyer was furious and insisted on unburdening his soul to the Governor on this illegal blow to the independence of the judiciary.'

During Dwyer's brief sojourn at Cape Town, he also crossed swords with Fitzpatrick. The young Chief Justice must

77. Act No.1 of 1872.

78. Walker, op.cit., p.69.

79. Walker, op.cit.

have found his colleagues extremely trying, as both possessed fiery Irish tempers. When Dwyer returned to Cape Town, it is not unreasonable to assume that the Chief Justice heaved a huge sigh of relief.

In 1877 Judge Denijssen retired on pension and left the colony to settle in Germany. Dwyer was obliged to move to Cape Town, this time on a permanent basis. The vacancy at Grahamstown was filled by Sir Jacob Barry, the former Recorder of Griqualand West.

7.6. CIVIL JURY TRIALS

According to Hahlo and Kahn;⁸⁰

'After two decades of disappointing experience, the civil jury sat only when requested by either side.'

However there appears to have been no instance of a civil jury trial being held under the 1854 Act.⁸¹ It was therefore decided to amend the Act in 1874, so as to encourage suitors to make use of civil juries. When the amending Bill was debated in the Legislative Council, it was stated that the reason why the 1854 Act had never been put into operation, was because 'the suitors objected to their cases being heard before a jury composed of men who constituted the petty jurors'.⁸² The new Act⁸³ accordingly provided that the jurors had to be selected from the list of grand jurors.⁸⁴ However it also made civil jury trial the exception rather than the rule, and in future the civil jury would only sit when requested by either side.⁸⁵

80. H.R.Hahlo and Ellison Kahn, South Africa : The Development of its Laws and Constitution, London : Stevens; Cape Town : Juta, 1960, p.214.

81. Act No.7 of 1854.

82. Cape Parliamentary Papers, Legislative Council Debates, June 1874, p.95.

83. Act No.30 of 1874.

84. Section 5.

85. Section 2.

7.7. THE 1874 COMMISSION OF INQUIRY INTO THE
JUDICIAL ESTABLISHMENT

7.7.1. INTRODUCTION

On 24 July 1874 the Governor appointed a Commission of Inquiry to investigate the best and most efficient means for improving the administration of justice in the colony.⁸⁶ It appears, however, that the immediate reason for appointing the Commission was to stall the inhabitants of the Eastern districts, who were lobbying for a three judge court at Grahamstown. Inter-provincial rivalry, rather than glaring defects in the judicial establishment, proved to be the driving force behind the Easterners' demands for a court of equal jurisdiction and status to that of the Supreme Court.

It galled the Easterners that the judges at Cape Town, who were of no higher status according to the law, were allowed to sit in judgment on their colleagues at Grahamstown while they themselves were subject only to the Judicial Committee of the Privy Council. The proposed temporary removal of Judge Dwyer to Cape Town during Chief Justice Bell's illness had 'outraged the dignity of the Eastern Districts Court', and in the face of the uproar raised by the Easterners, he had to be turned back at Port Elizabeth. Simeon Jacob's appointment as Attorney-General had also roused considerable inter-provincial

86. Cape of Good Hope Government Gazette, Government Notice No.349, dated 23 July 1874.

feeling, and when Jacobs summoned Judge Dwyer to Cape Town as a 'temporary Justice of Appeal' in April 1874, matters reached boiling point. It was clear that measures would have to be taken to diffuse the situation, and within ninety days a Commission of Inquiry had been set up with the Chief Justice as Chairman.

True to form, the members of the Commission were unable to reach agreement over the future of the Eastern Districts Court. The Chief Justice and five of the members, who represented the Western and Midland interests, were in favour of reducing the Bench of the Eastern Districts Court to a single judge. Judge Fitzpatrick and the remaining two members, who represented the Eastern interests, were in favour of increasing the Eastern Districts Bench to three judges, and they recommended that it should be given jurisdiction equal to that of the Supreme Court.

7.7.2. RECOMMENDATIONS

The Commissioners submitted their report to the Governor on 3 February 1875.⁸⁷ Attention was focussed on the following subjects :

1. The constitution of the superior courts, and in particular the Eastern Districts Court.
2. The system of circuit courts.
3. The system of public prosecution.
4. The sheriff's department.
5. The administration of justice in the country districts.
6. The jurisdiction of the magistrates' courts.

87. Cape Parliamentary Papers, G.27. -'75, p.5-16.

Although the Commissioners were unanimous in giving their support to most of the recommendations, they parted ways when it came to the proposals concerning the future of the Eastern Districts Court. Judge Fitzpatrick and the two Eastern representatives submitted a memorandum in which they formulated the minority views concerning the latter subject.

7.7.2.1. THE CONSTITUTION OF THE SUPERIOR COURTS, AND
IN PARTICULAR THE EASTERN DISTRICTS COURT

The Commissioners pointed out that the majority of the witnesses were of the opinion that the constitution of the Eastern Districts Court was defective because the possibility existed that the two judges might disagree.⁸⁸ Although the Commissioners were not prepared to concede that the 'danger and Evil' was as great as had been represented by some of the witnesses,⁸⁹ they were nonetheless of the opinion that the constitution of the court could be greatly improved by adopting the following recommendation;⁹⁰

'The Supreme Court to consist of a Chief Justice and five puisne judges, and the Eastern Districts Court of one judge, he being one of the six judges of the Supreme Court. The Chief Justice and the puisne judges respectively to preside in rotation in the Eastern Districts Court for a period of six months, to proceed on the Eastern circuit after the expiration of such six months, and then to return to Cape Town to resume their duties in the Supreme Court. A residence to be provided by the government for the Eastern Court judges at or near the place where the court is heard. Parties to be at liberty to have their

88. Cape Parliamentary Papers, loc.cit., p.5.

89. See ANNEXURE 9 for a Table of cases during the period 1869-1874, in which no decision was given owing to the judges differing in opinion.

90. Cape Parliamentary Papers, loc.cit., p.5-6-

cases tried by a jury as in the Supreme Court. All appeals from the Eastern Districts Court and circuit courts to go as heretofore to the Supreme Court.'

The Commissioners pointed out that, if the recommendations were adopted, the colony would have the advantage of a strong Supreme Court, possessing both original and appellate jurisdiction. At the same time, the Eastern districts would continue to enjoy the benefits of a local court, and the danger of the court being unable to arrive at a decision would be avoided. Furthermore the judges would not be deprived of the benefit of deliberating with their colleagues, and they would be in a better position to carry the principles and practice of the Supreme Court to the Eastern Districts Court. They pointed out the judges would not be unduly inconvenienced because they would only have to take their turn in the Eastern Districts Court once in three years. Finally they stated that;⁹¹

'Effective security would be provided "against the silent growth of conflicting systems of law and practice" in different parts of the colony, and the dangers to be apprehended from permanently locating a single judge in a small circle would be avoided.'

They recommended that the Chief Justice should be relieved of his duties as the President of the Legislative Council so as to enable him to preside over the Eastern Districts Court.⁹² During his absence from Cape Town, one of the judges could be appointed to represent him as Judge of the Vice-Admiralty Court. They were also in favour of conferring Vice-Admiralty jurisdiction on the judges for the duration of their residence in the Eastern districts.

91. Cape Parliamentary Papers, loc.cit., p.6.

92. Cape Parliamentary Papers, loc.cit.

They proposed that the seat of the Eastern Districts Court should be removed from Grahamstown to Port Elizabeth, because it was the most important seaport and it furnished the greatest number of cases.⁹³ They also pointed out that Port Elizabeth was about to be connected with most of Eastern districts by railway.

They dismissed the evidence which was in favour of strengthening the Eastern Districts Court on the grounds that it would 'take away the supremacy of the Supreme Court', and they explained that;⁹⁴

'In other words, the court at present held at the seat of government would cease to be the Supreme Court of the Colony. So long as this colony remains one and undivided "the maintenance at the capital of a Supreme Court exercising a jurisdiction as are the limits of this colony" must, in the words of Lord Grey, in his admirable dispatch of the 4th December 1846, to Sir Henry Pottinger, remain "among the stable (if not immutable) principles of the judicial system of the Cape of Good Hope".'

7.7.2.2. THE SYSTEM OF CIRCUIT COURTS

The Commissioners were of the unanimous opinion that no alteration in the law was required to regulate the circuit courts.⁹⁵ They pointed out that the Charter of Justice had made ample provision for the holding of circuit courts as often, and at as many places, as was necessary. In addition the Act⁹⁶ constituting the Eastern Districts

93. Cape Parliamentary Papers, loc.cit., p.7.

94. Cape Parliamentary Papers, loc.cit., p.8.

95. Cape Parliamentary Papers, loc.cit.

96. Act No.21 of 1864, Section 37.

Court had expressly provided that circuits could be held simultaneously in both provinces of the colony. They were of the opinion that half-yearly circuits in both the Western and the Eastern districts were sufficient to satisfy the needs of the colony. However they recommended that the circuit court venues should be fixed, and that no alteration should be made unless it became imperative. They referred to the haste with which the circuit court business was often conducted, and suggested that this could be prevented by giving not less than six weeks' notice before the circuits were held. They also recommended that the period between the service of the summonses and the sitting of the courts should be extended to not less than seven days, and that sufficient time should be allowed to enable the advocates at each circuit town to have a clear day before the sitting of the court. They explained that if these measures were adopted;⁹⁷

'The plaintiff would have ample time to prepare for trial, the defendant would never be taken by surprise, and counsel on both sides would have time to prepare the pleadings and master the details of cases entrusted to them.'

7.7.2.3. THE SYSTEM OF PUBLIC PROSECUTION

The Commissioners were unanimous in recommending that the system of public prosecution should be maintained in its existing form.⁹⁸ However they pointed out that there was substantial evidence which suggested that the Attorney-

97. Cape Parliamentary Papers, loc.cit., p.9.

98. Cape Parliamentary Papers, loc.cit.

General should be a permanent officer of the Crown, and not a political officer, who was 'liable to displacement upon the resignation of the Ministry to which he belonged'.⁹⁹ They therefore recommended that the Attorney-General should cease to be a member of the government, 'and that his place should be taken by a Minister of Justice'.¹⁰⁰ In their opinion this would afford better security for the efficient and impartial discharge of his duties. They pointed out that the Attorney-General's duties were extremely onerous and that they would be very much lightened by relieving him of his political office. They had no objection to retaining the services of the Solicitor-General, who would continue to act as the public prosecutor in the Eastern Districts Court. But they stressed that he should always be subject to the directions of the Attorney-General, as the head of the department. They recommended that the advocates should continue to conduct the circuit court prosecutions, and that they should be assisted by the clerks of the peace.¹⁰¹

They approved of the system whereby clerks of the peace conducted the prosecutions in the magistrates' courts, but owing to the increase in the number of magistracies, they did not think that it would be practical to appoint a clerk of the peace for every district. In districts where there were no clerks of the peace, they had no objections to practising attorneys being appointed to conduct the magistrates' court prosecutions. However where

99. Cape Parliamentary Papers, loc.cit.

100. Cape Parliamentary Papers, loc.cit.

101. Cape Parliamentary Papers, loc.cit., p.10.

suitable attorneys could not be found, they stated that the prosecutions would have to be conducted by the magistrates' clerks, who would be immediately responsible to the Attorney-General for the proper performance of their duties.

7.7.2.4. THE SHERIFF'S DEPARTMENT

The Commissioners pointed out that they had received a number of complaints from the practitioners in the Eastern districts concerning the sheriff's department.¹⁰² The main complaint was that the money collected by the deputy-sheriffs had to be sent to Cape Town before it could be paid over to the judgment creditors. In order to remedy this 'evil', they suggested that the deputy-sheriffs should be required to pay the money into court. The registrar would issue a receipt to the deputy and that would be equivalent to payment to the sheriff. The registrar could then pay out the money to the judgment creditor, and the sheriff's responsibility for any misapplication of the money would cease after it had been paid into court.

7.7.2.5. THE ADMINISTRATION OF JUSTICE IN THE COUNTRY DISTRICTS

The Commissioners pointed out that they had received proposals that the justices of the peace in the outlying

¹⁰²Cape Parliamentary Papers, loc.cit.

districts should be granted criminal jurisdiction to try minor offences.¹⁰³ However they were of the opinion that the justices of peace did not, as a rule, have sufficient legal training for the purpose, and that even if they had;¹⁰⁴

'It would not be advisable to confer such further jurisdiction in outlying and thinly populated places, which are wholly destitute of public opinion, on an unpaid, and virtually irresponsible magistracy.'

They were of the opinion that in those districts where it was impractical to station resident magistrates, the only solution would be to continue to hold periodical courts.

7.7.2.6. THE JURISDICTION OF THE MAGISTRATES' COURTS

The Commissioners did not think it would be advisable to increase the jurisdiction of the magistrates' courts in criminal cases.¹⁰⁵ They were of the opinion that the magistrates' powers of conviction and punishment had reached the utmost limit, and they recommended that the right of appeal to the Supreme Court should not be restricted to cases where the sentence of imprisonment exceeded one month, or to a fine exceeding £5, or to more than twelve lashes. They were of the opinion that a distinct right of appeal should be given in every case of conviction and sentence, and that;¹⁰⁶

'It should be competent for a judge of the Supreme Court, on a review of a case, to reduce any sentence which he may consider to be beyond what substantial justice or the circumstances of the case may require.'

103.Cape Parliamentary Papers, loc.cit., p.11.

104.Cape Parliamentary Papers, loc.cit.

105.Cape Parliamentary Papers, loc.cit.

106.Cape Parliamentary Papers, loc.cit., p.12

They were also opposed to an increase in the civil jurisdiction of the magistrates' court in so far as illiquid claims were concerned, but they had no objection to increasing it to £100 in liquid claims.

7.7.3. THE MINORITY RECOMMENDATIONS

The Commissioners pointed out that at only one of the many sittings of the Commission was the idea of a one judge court put to a witness; and that witness had rejected it and was in favour of a court of three judges.¹⁰⁷ Furthermore all the witnesses who advocated a second court for the colony were unanimous in stating that it should consist of three judges. They drew attention to the only evidence which supported a one judge court, and stated that it had been in the form of a written communication from the Recorder of Griqualand West. They pointed out that a court, in which the judges were rotated, would change character every six months with the change of judges, and they stated that it was therefore bound to lose its dignity and influence.

They predicted that there would be a falling off of the Bar attending such a court, and they stated that an efficient Bar was as indispensable to the proper administration of justice as an efficient Bench. In their opinion, 'any experiment by which one might be destroyed, even if the other was preserved, should be avoided'.¹⁰⁸

107.Cape Parliamentary Papers, loc.cit., p.13.

108.Cape Parliamentary Papers, loc.cit., p.14.

They refuted the objections which had been raised against a three judge court for the Eastern districts by referring to the position in England and Ireland, where there were separate courts of concurrent jurisdiction administering the same law, and they stated that there was no evidence to suggest that conflicting systems of law had sprung up there. They also pointed out that not one single instance of conflicting precedents from the Cape and Natal Supreme Courts could be adduced to the Commission.

They therefore suggested that the following recommendations should be accepted;¹⁰⁹

'The Supreme Court, henceforth to be composed of six judges, to be formed into two divisions of three judges each. The first division, with its seat in Cape Town, to be presided over by the Chief Justice, and to have jurisdiction over the whole colony, but to do circuit duty only in the Western districts. The second division, with its seat at Port Elizabeth, to be presided over by a chief judge, and to have like jurisdiction, but only within the Eastern districts. No appeals, for the present, to lie from the judgment of either division, excepting such as now lie from the Supreme Court itself to the Privy Council, and these to lie direct from either division. The united Supreme Court to be summonable at any time and at any place in the discretion of the Governor, for the framing of rules of court, from time to time, equally binding upon both divisions, and for the settlement of conflicting precedents of law between the two divisions, should such at any time arise, or for any other object deemed to be of sufficient consequence to the colony by the Governor.'

¹⁰⁹.Cape Parliamentary Papers, loc.cit., p.16.

7.8. THE OUTCOME OF THE INQUIRY

The Chief Justice, who had been the driving force behind the plan to reduce the Eastern Districts Court to a Bench of one judge, failed in his attempts to persuade Parliament to adopt the recommendations. The 'spirit' of the report was certainly his, and he fought very hard for its acceptance. During the 1875 Parliamentary session, he even descended from his presidential chair to make one of his rare speeches in an attempt to persuade the members of the Legislative Council to adopt the report.¹¹⁰ However the Eastern representatives were not prepared to allow their court, 'defective' as it was, to be reduced in status, and they continued to press their demands for a third judge.

The sole immediate outcome, in so far as the superior courts were concerned, was an Act¹¹¹ which authorized a single judge, during vacation, to exercise powers which, during term, had to be performed by a quorum of two judges. The complaints which had been directed against the sheriff's department were referred to a Select Committee of the House of Assembly.¹¹² However the Committee was unable to resolve the problem, and the money collected by the deputy-sheriffs continued to be sent to Cape Town before it could be paid over to the judgment creditors. The only recommendation to be accepted, related to criminal appeals from the magistrates' courts. In 1876 a

110. Cape Parliamentary Papers, Legislative Council Debates, 1875.

111. Act No. 23 of 1875.

112. Cape Parliamentary Papers, Select Committee Reports, A.11. - '75.

full right of appeal was granted from all convictions to the Supreme Court or, in the Eastern districts, to the Eastern Districts Court, or appropriate circuit court.¹¹³

The other recommendations were rejected, and the Chief Justice and the Attorney-General continued to hold parliamentary offices. In 1876 the justices of the peace were authorized to try minor charges of assault, theft, master and servant offences and liquor contraventions.¹¹⁴ However all convictions had to be reviewed by a judge.

The 'boy in ermine' had come up against the mace and had found it to be a sturdy and unyielding rod. However he continued to advocate the supremacy of the Supreme Court, and he remained a staunch opponent of any form of judicial localization. In February 1877 he wrote to the Governor on the subject of localization, and stated the following;¹¹⁵

'The more legislation in regard to the administration of justice is localized, the greater is the tendency to increase the number of the judges... In some of the colonies the number of the judges is quite out of proportion to that of the population. In this colony the disproportion is not so great, but even here we have five judges to do the work which four could conveniently perform. In the Orange Free State there are three judges for a population not much exceeding 60,000. In Natal there are, I believe, three judges, but I have been informed by one of them (Mr. Justice Phillips) that there is not more business than one could conveniently attend to... If this

113. Act No. 21 of 1876, section 4.

114. Act No. 10 of 1876

115. Walker, op.cit., p. 105.

colony be divided into two or more provinces, I fear the number of judges will soon be increased to such an extent as seriously to lower the standard and efficiency.'

However in 1879 the colony obtained an Appeal Court, and the Eastern Districts Bench was enlarged to three judges. Walker states that the Act received de Villier's qualified blessing.¹¹⁶ However when viewed against the above-mentioned letter, the statement seems most unlikely. Kahn's version appears to be a more accurate assessment of de Villier's reaction. According to Kahn;¹¹⁷

'To de Villiers the creation of a Cape Court of Appeal was galling for, although it did not hear civil appeals from the Supreme Court, its composition implied partial recognition of the equality of the courts at Grahamstown and Kimberley.'

7.9. DEVELOPMENTS IN THE FIELD OF JUDICIAL PRECEDENT

In 1870 a significant development took place in the field of judicial precedent. The reports, which had been compiled by Judge Menzies, were edited by advocate James Buchanan and published in three volumes. The Menzies' Reports, which covered the decisions of the Supreme Court during the period 1828-1849, were well received by the legal fraternity, and it was necessary to reprint the second volume in 1882. An analysis of the Reports reveals that in the following cases, the court expressly relied on previous decisions to justify its judgments;¹¹⁸

116.Walker, op.cit., p.106.

117.Kahn, loc.cit., p.226.

118.Ellison Kahn, The Rules of Precedent applied in South African Courts, South African Law Journal, vol.84, 1967, p.45.

In re Taute (1830) I Menz. 497

Koemans v. Van der Watt (1838) I Menz. 36

Wood v. Gilmour (1840) 3 Menz. 159

Westhuyzen v. Pope (1842) 2 Menz. 60

De Smidt v. Blanckenberg (1844) 2 Menz. 248

Van der Byl v. Munnik (1845) 2 Menz. 73

The process continued to grow and develop, but according to Kahn, 'for many years most cases invoked novel points that were decided mainly by straight application of Roman Dutch authority'.¹¹⁹ The judges, however, were not prepared to be bound by decisions which they considered to be wrong,¹²⁰ and they carefully considered an earlier decision before invoking it.¹²¹ In 1856 Judge Watermeyer demonstrated the application of judicial precedent in the case of Wilson's Trustees v. Martell.¹²² After citing Harris v. Buissinne's Trustee¹²³ and Van Aardt v. Hartley's Trustee,¹²⁴ he stated the following;¹²⁵

'By the aid of these two cases, which are by no means in conflict with each other, but plainly reflect the differing legal results of the different circumstances, let us approach the present more nearly.'

It is not surprising to learn that Judge Watermeyer produced the first volume of law reports to be published at the Cape. Unfortunately the Watermeyer Reports only covered the year 1857. Consequently until 1870, the Bench and Bar had to make use of the court records and the newspaper reports which featured all the prominent cases. Fortunately Judge Menzies, who had intended to publish his own reports, was always willing to permit use being

119. Kahn, loc.cit.

120. Wylde v. Wylde (1835) I Menz. 269 at 272.

121. Meyer v. Low (1832) 2 Menz. 8 ; Southey v. Borcheds (1844) I Menz. 22.

122. (1856) 2 Searle 248.

123. (1840) 2 Menz. 105.

124. (1845) 2 Menz. 135.

125. (1856) 2 Searle 256.

made of them.¹²⁶ Most of the gaps were subsequently filled in the 1880's and 1890's when the law reports began to be published on regular basis. However the records of the Eastern Districts Court for the period 1865-1879 were never published.

In 1877 the Chief Justice drew attention to the importance of the Supreme Court decisions when he stated that;¹²⁷

'The decisions of the Supreme Court of this colony are received with as much respect in the Courts of the Republics and, if I am not misinformed, in the Courts of Natal and Griqualand West, as the decisions of their own Courts.'

However it is ironic that de Villiers, who made the first reported pronouncement on the stare decisis principle in 1880,¹²⁸ did not always consider himself to be bound by the decisions of his predecessors,¹²⁹ and he was highly critical of the Judicial Committee of the Privy Council when they upset his own decisions.¹³⁰

The decisions of the Judicial Committee of the Privy Council do not appear to have had much influence on the development of judicial precedent at the Cape during the period 1828-1879. Only 14 cases had been taken on appeal.¹³¹ However it is significant that 7 of the cases were upheld by the Committee. In 1871 provision was made to

126. C Graham Botha, *The Honourable William Menzies 1795-1850*, *South African Law Journal*, vol.33, 1916, p.392

127. Walker, *op.cit.*, p.77.

128. *R v. Strydom* (1880) 1 S.C. 60 at 61.

129. *Hough v. van der Merwe* (1874) Buch. 148; *Alexander v. Perry* (1874) Buch. 59.

130. *Hidding v. S.A. Association* 5 S.C. 298; commented on by de Villiers at 6 S.C. 238; *R. v. Van Reenen and others* 20 S.C. 667; commented on by de Villiers at 12 C.T.R. 1056.

131. See ANNEXURE 10 for a Table depicting the cases which were taken on appeal.

appoint four persons as paid members of the Committee,¹³² and in 1876 they were superseded by Lords of Appeal in Ordinary.¹³³ The newly strengthened Judicial Committee was destined to play a far greater role in the development of judicial precedent at the Cape. Furthermore with the publication of the local law reports, it became possible to develop the principle of stare decisis.

132. Judicial Committee Act, 34 & 35 V. c. 91.

133. Appellate Jurisdiction Act, 39 & 40 V. c. 59.

ANNEXURE 9

Table of Cases tried in the Eastern Districts Court during the period 1869-1874, in which no decision was given owing to the Judges differing in opinion*

1872	<u>James Wheelden v. Cornelius Krog</u>	(29 August)
	<u>The Queen v. Thomas Kelly</u>	(10 December)
1873	<u>P.F.Krohn v. John Nourse</u>	(10 June)
	<u>Gau and others v. J.McDonald</u>	(16 June)

* The Eastern District Court cases for the period 1865-1879 have yet to be edited and published. However the records are available for reference purposes at the Cape Archives Depot.

ANNEXURE 10

Table of Cases taken on Appeal to the Judicial Committee of the Privy Council during the period 1828-1879*

1. Swan's Executors v. Van der Riet 3 Menzies 439; upheld on appeal, 2 Moo. P.C. 177.
2. Maxwell, Wright & Co. v. Deare & Dietz 1 Searle 50; upset on appeal, 1 Searle 57.
3. Stanford v. Brunette 3 Searle 101; upheld on appeal, 3 Searle 112.
4. Namagua Mining Co. v. Commercial Marine and Fire Insurance Co. 3 Searle 231; partially upset on appeal, 3 Searle 242; interpreted by Supreme Court, 1 Roscoe 47.
5. Long v. Bishop of Cape Town 4 Searle 162; upset on appeal, 1 Searle 175.
6. Breda v. Silberbauer 5 Searle 231; upheld on appeal, 5 Searle 242.
7. Murray v Burgers 1 Roscoe 218, 252, 258; upheld on appeal, 4 Moo. P.C. 250.
8. Graham, N.O. v. Pocock, N.O. (1868) Buch. 231; upheld on appeal, 7 Moo. P.C. 152.
9. Graham, N.O. v. Pocock, N.O. (1868) Buch. 233; upset on appeal, 7 Moo. P.C. 152.
10. Paterson's Marriage Settlement Trustees v. Paterson's (1869) Buch. 95; upset on claim in reconvention, 7 Moo. P.C. 333 (reported as Thurburn v. Steward).
11. Smith v. Carpenter (1869) Buch. 206; upheld on appeal, (1869) Buch. 212.
12. Denyssen v. Mostert (1869) Buch. 231; upset on appeal, (1873) Buch. 31 (also reported as S.A. Association v. Mostert).
13. De Villiers v. Cape Divisional Council (1875) Buch. 50; upset on appeal, (1875) Buch. 175.
14. Union Steamship Co. Ltd. v. Table Bay Dock and Break-water Management Commission (1875) Buch. 110; upheld on appeal, (1876) Buch. III.

* The Table has been compiled from cases reported in, Murray Bisset and P.F. Smith, The Digest of South African Case Law, Cape Town : Juta, 1909, vol.3.

A photograph of the Old Supreme Court taken between 1870 and 1880



CHAPTER EIGHT

8. APPEALING YEARS

8.1. INTRODUCTION

In 1878 the Governor, Sir Bartle Frere, dismissed the Molteno Cabinet, and Gordon Sprigg was invited to 'fill Mr. Molteno's place, if not his shoes'.¹ The Sprigg Ministry, which was drawn entirely from the Eastern districts of the colony, lost no time in giving the Eastern Districts Court a third judge.² The Act also made provision for the establishment of a Court of Appeal, which was to be composed of the Chief Justice, the two Supreme Court judges at Cape Town, and the senior judge of the Eastern Districts Court. The Court of Appeal was given jurisdiction to hear civil appeals from the circuit courts and from the Eastern Districts Court. However appeals from the Supreme Court continued to go direct to the Judicial Committee of the Privy Council. In criminal cases the Court of Appeal was empowered to consider special entries of irregularity, and reservations of points of law, from the Supreme Court as well as from the other courts. Thus although the Eastern Districts Court obtained a third judge, and despite the fact that it stood on equal terms with the Supreme Court in criminal cases, it was denied concurrent jurisdiction in civil cases. The blow which had been dealt to the Supreme Court must have been a galling experience

1. W.E.Gladstone Solomon, Saul Solomon : The Member for Cape Town, Cape Town : OUP, 1948, p.219.

2. Act No.5 of 1879.

for de Villiers. However the pill was somewhat sweetened, because, in practice, the Appeal Court Bench was dominated by the Cape Town judges.

The establishment of the Court of Appeal was not the only event of importance to the administration of justice. In 1879 the full impact of racial prejudice was forcefully driven home during the circuit court sessions at Victoria West. White justice was seen at its worst, when the jury refused to convict the perpetrators of the Koegas Massacres in the face of overwhelming evidence. The cases arose out of the shooting in cold blood of captured Koranna prisoners, including a number of women and a child, by white farmers in the North Western Cape. The accused, who were escorting the prisoners, were charged with murder, and despite a strong summing up against them by the judge, they were, amidst great applause, acquitted.

The 'Koegas trials' had a sequel when the Attorney-General, Thomas Upington, sued the proprietor and the editor of the Cape Argus for libel, on the grounds that they had falsely accused him of failing to remove the cases to Cape Town because of political pressure.³

In 1877 the Cape Parliament passed an Act⁴ which made provision for the annexation of Griqualand West. However the Act was only put into operation on 15 October 1880. In terms of the Annexation Act the recorder of the Griqua-

3. Upington v. Dormer and Solomon (1879) Buch. 240.

4. Act No.39 of 1877.

land West High Court was to be made a judge of the Supreme Court, and appeals from the High and circuit courts were to lie, in the first instance, to the Supreme Court. Prior to the annexation, appeals went direct to the Judicial Committee of the Privy Council. The Annexation Act had failed to anticipate the establishment of the Court of Appeal in 1879, and it was therefore necessary to amend both Acts in order to accommodate the Griqualand West High Court. On 29 July 1880 the Cape Parliament passed the necessary legislation and the Supreme Court was given concurrent jurisdiction with the High Court, in the soon to be acquired territory of Griqualand West.⁵ The recorder became a judge of the Supreme Court, which now consisted of the Chief Justice and six puisne judges. Appeals which, in terms of the 1877 Act, were to go to the Supreme Court, now lay to the Court of Appeal.

In 1882 it became necessary to increase the number of judges at Kimberley, and the structure of the courts was made uniform.⁶ The Supreme Court was enlarged to the Chief Justice and eight puisne judges, and the senior judge at Kimberley was given a seat on the Court of Appeal. At Cape Town the Chief Justice and the two senior puisne judges presided over the Supreme Court. They also presided over the Court of Appeal, together with the Judge Presidents of the Grahamstown and Kimberley courts. The Eastern Districts Court and the High Court of Griqualand West each consisted of a Judge President and two puisne

5. Act No. 12 of 1880.

6. Act No. 40 of 1882.

judges. Civil appeals from the Grahamstown and Kimberley courts in which only two judges concurred, or against a judgment of a circuit court, had to be heard by not less than three judges of the Court of Appeal; and every appeal against a unanimous judgment of the three judges at Grahams-town or Kimberley had to be heard by not less than four judges of the Court of Appeal. Further appeal lay to the Judicial Committee of the Privy Council, which continued to hear appeals from the Supreme Court.

The Administration of Justice Act of 1882 also extended the jurisdiction of the Eastern Districts Court. It gave the court concurrent jurisdiction with the Supreme Court in the districts of Humansdorp, Uitenhage, Jansenville, Aberdeen, Murraysburg, Richmond and Hope Town; and also in the Transkei and Griqualand East.

However the Court of Appeal received a mixed reaction. Although its decisions commanded great respect, it proved to be both cumbersome and expensive. De Villiers and his Cape Town colleagues tended to lord it over their Grahams-town and Kimberley brethren, 'and once at least they out-voted the two Judge Presidents'.⁷ According to Walker, 'the precedence given to the Cape Town puisne judges galled their brother justices in the other courts'.⁸ The frequent absence of the Judge Presidents delayed the business of the court, and it was felt in certain quarters that the work could be done just as effectively by the

7. Eric A Walker, Lord de Villiers and His Times in South Africa 1842-1914, London : Constable, 1925, p.107.

8. Walker, op.cit.

Supreme Court. On the other hand the Court of Appeal implied partial recognition of the equality of the courts at Grahamstown and Kimberley, 'as they were strictly speaking no longer bound by Supreme Court rulings'.⁹ Sir Jacob Barry, who was the Judge President of the Eastern Districts Court, is reported to have told Victor Sampson that he did not agree with all the Chief Justice's decisions.¹⁰ However in a letter to de Villiers he stated that 'save for one volume of one term when the Chief Justice was absent, the reports of the Court of Appeal and of the Supreme Court had held first place as authorities at Grahamstown'.¹¹ The fact remained that the Court of Appeal would serve as a useful vehicle for unifying the legal system in the neighbouring states. However when Carnarvon's federation scheme failed, in de Villier's eyes, 'its raison d'être had disappeared'.¹² Amidst great opposition, especially from the Eastern districts, the Court of Appeal was abolished in 1886 'by an obscure provision in an obscure Act'.¹³ According to Walker,¹⁴

'The Premier, Upington, inflamed the wrath of the Easterners by accusing the Grahamstown judges of "want of loyalty" in that they "had tried to set up...separate systems of criminal procedure", declaring that if they had "entered into the spirit of this Appeal Court Act" abolition would never have been heard of. De Villiers, though approving of the Bill, tried to smooth the ruffled feelings on both sides, only to receive the somewhat tart rejoinder from Upington that he had accused the Eastern judges not of active but of passive resistance.'

9. H.R.Hahlo and Ellison Kahn, South Africa : The Development of its Laws and Constitution, London : Stevens; Cape Town : Juta, 1960, p.211.
10. Victor Sampson, My Reminiscences, London : Longmans Green, 1926, p.54.
11. Walker, op.cit., p.108. Letter dated 26 June 1886.
12. Walker, op.cit., p.107.
13. Hahlo and Kahn, op.cit. Act No.17 of 1886.
14. Walker, op.cit.

The 1886 Act vested the Supreme Court with all the powers of the former Court of Appeal. Appeals from the Eastern Districts Court, the High Court of Griqualand, and the circuit courts had to be heard by not less than three judges, one of whom had to be the Chief Justice. The other two judges had to be specially assigned to the Supreme Court. In cases of appeal against the unanimous judgment of the full Bench of the Grahamstown or Kimberley courts, the three appeal judges had to reach an unanimous decision.

On 25 July 1884 provision was made to allow the use of the Dutch language in the courts of law and in the legal proceedings.¹⁵ Although the magistrates were obliged to allow the language to be used upon request, the judges were given a discretion to disallow any such request. On 18 June 1886 an important amendment was made to the law of criminal procedure and evidence, which allowed an accused and his or her spouse to give evidence under oath in criminal trials.¹⁶

The restructuring of the courts resulted in a number of new appointments being made to the Bench. Judge Fitzpatrick, who had been subjected to an inquiry into his conduct at the instigation of advocate A.F.S. Maasdorp, emerged victorious. However he decided to retire in the following year and his place was taken by Andries Stockenström. Judge Stockenström, who had previously held the Attorney-Generalship, was of sickly disposition and he

15. Act No.21 of 1884.

16. Act No.13 of 1886.

died within six months of his appointment to the Bench. Judge Smith was transferred to Cape Town where he presided together with Chief Justice de Villiers and Judge Dwyer. At Grahamstown Judge Barry presided together with Judge Smith until the latter's transfer to Cape Town in 1880. Smith was replaced by Simeon Jacobs, who had resigned as Attorney-General in 1877 because of ill health. However Judge Jacobs was obliged to retire soon after his appointment, and he was replaced by Ebenezer John Buchanan. Sydney Shippard completed the complement of judges at Grahamstown. Judge Shippard resigned in 1885, and the vacancy was filled by Christian George Maasdorp. In 1886, when the Court of Appeal was abolished, the Eastern Districts Court consisted of Sir Jacob Barry the Judge President, Judge Buchanan and Judge Maasdorp. When the Griqualand West High Court was established in 1871, Barry was appointed Recorder. He resigned to take up an appointment on the Eastern Districts Court Bench in 1878, and Sydney Shippard filled the Recordership in an acting capacity. Shippard followed Barry to Grahams-town, and the Solicitor-General, Jacobus Petrus de Wet, left Grahamstown to fill the vacancy on the Kimberley Bench. Judge de Wet left the Kimberley Bench in July 1880, and the vacancy was filled by James Buchanan. When the High Court of Griqualand became a three judge court in 1882, Judge Buchanan became the Judge President; and Sydney Twentymen Jones and Percival Maitland Laurence were appointed to the Kimberley Bench.

During the 'appealing years' judicial precedent was openly recognized as a source of law. The decisions of the Cape Supreme Court, and those of the Court of Appeal, commanded great respect not only within the colony, but also in the courts of the neighbouring states. In practice, the Court of Appeal was really the Supreme Court sitting under another name, and although the Kimberley and Grahamstown courts were not, strictly speaking, bound by the decisions of the Supreme Court, the judges stood the risk of having their decisions overruled on appeal if they stepped out of line. It is therefore not surprising that the decisions of the Supreme Court held first place as authorities at Grahamstown and Kimberley. The two Judge Presidents had practiced for a number of years at the Cape Town Bar, and both were fully conversant with the decisions of the Cape Supreme Court. Judge Buchanan had in fact edited the Menzies Reports. The importance of judicial precedent was further evidenced by the rapid growth in the publications of law reports. The current reports began to be printed on a regular basis, and most of the early decisions of the Supreme Court were published. Finally the Chief Justice began to lay down the principle of stare decisis,¹⁷ and this proved conclusively that judicial precedent had come of age.

8.2. THE ADMINISTRATION OF JUSTICE AMENDMENT ACT OF 1879

The Administration of Justice Act,¹⁸ which was promulgated

17. R v. Strydom (1880) 1 S.C. 60 at 61; Marsh v. Makein (1882) 2 S.C. 104; Michaelis v. Braun (1886) 4 S.C. 205.

18. Act No.5 of 1879.

on 8 September 1879, proved to be a very controversial measure which satisfied no one. Although it gave the Eastern Districts Court a third judge, it failed to raise it to a position of equality with the Supreme Court. By removing the appellate jurisdiction of the Supreme Court, it implied partial recognition of the Eastern Districts Court, but at the same time it created a Court of Appeal which was in reality the Supreme Court sitting under a different name. However it went some way towards appeasing the Easterners and was tolerated by the judges of the Supreme Court at Cape Town. The Court of Appeal also had the potential to develop into a common court of appeal for the proposed confederation of Southern African states.

The Act, which was the work of the Sprigg Ministry, clearly reflected Eastern interests. The Grahamstown Bench was strengthened by the addition of a third judge, and the senior judge was henceforth to be known as the Judge President.¹⁹ Furthermore the Judge President was given a seat on the Court of Appeal, but in practice he could always be outvoted by his fellow appellate judges. Although it was technically possible for the Governor to assign one or both of the Grahamstown puisnes to the Court of Appeal, the honour went to the Cape Town puisnes.²⁰

Prior to the passing of the Act, when a difference of opinion arose between the two Grahamstown judges, the case

19. Section 3.

20. Section 7.

had to be removed to Cape Town for final determination. This was resolved by the Amendment Act which provided that in similar situations, judgment would be suspended pending the presence of all three judges. The decision of the majority would then be taken to be the judgment of the court.²¹

The Court of Appeal, which consisted of the Chief Justice, the Judge President and the two Cape Town puisne judges, was only authorized to hear civil appeals from the Eastern Districts Court and the circuit courts.²² Appeals from the Supreme Court continued to go directly to the Judicial Committee of the Privy Council. The fact that the civil judgments of the Supreme Court were not subject to the jurisdiction of the Court of Appeal lay at the heart of the controversy. It clearly demonstrated the supremacy of the Supreme Court in relation to the Eastern Districts Court. To add insult to injury, as far as the Easterners were concerned, the majority of the appellate judges were drawn from the Cape Town Bench. It was not even necessary to summon the Judge President to Cape Town for purposes of hearing appeals from the circuit courts, or from the Eastern Districts Court when the decisions were not unanimous. In such cases the appeals could be heard by three of the judges of the Court of Appeal;²³ in other words the judges of the Cape Town Bench sitting under another name. However in cases of appeal against a unanimous judgment of the Eastern Districts Court, the full Court of Appeal had to be present.

21. Section 5.

22. Section 11.

23. Section 17.

For a litigant with ample means, a further right of appeal lay from the Court of Appeal to the Judicial Committee of the Privy Council.²⁴ It was also possible for litigants to bypass the Court of Appeal by taking their cases directly to the Cape Supreme Court, which retained concurrent jurisdiction in the Eastern districts.

The Act also provided for the establishment of a Court of Criminal Appeal, which consisted of the same judges who were appointed to hear civil appeals.²⁵ The Court of Criminal Appeal was authorized to hear special entries of irregularity, and reservations on points of law, from the Supreme Court, the Eastern Districts Court, and the circuit courts.²⁶ In this respect the Cape Town judges were brought down to the level of their colleagues at Grahamstown. When hearing criminal cases, the Court of Appeal was authorized to make the following orders :²⁷

1. It could confirm the judgment of the court below.
2. It could set the judgment aside, notwithstanding the verdict.
3. It could set the judgment aside, and order the court itself to give judgment.
4. If judgment had not been given by the court below, it could remit the case in order that judgment might be given.
5. It could itself give judgment.
6. It could make 'such other order as justice may require.

8.3. WHITE JUSTICE

When trial by jury was introduced at the Cape in 1828

24. Section 20.

25. Section 22.

26. Sections 23-25.

27. Section 27.

doubts were raised as to whether it would in fact promote justice. Theal accurately assessed the prevailing mood by posing the following conundrum;²⁸

'In the eye of the law the life of a Kaffir or a Bushman was as sacred as that of the Chief Justice himself, but could it be expected that nine men would always agree to subject a European to sentence of death for shooting a Kaffir or Bushman thief no matter how clear the evidence might be or how the judge might sum up?'

Theal's conundrum was answered in 1877, and again in 1879, when racial prejudice was allowed to blacken white justice. The first incident took place at Aliwal North during the 1877 circuit.²⁹ The accused, a white farmer, was indicted on a charge of murder. The Crown alleged that he had killed his servant, a youth of between 12 and 14 years of age, by beating him severely before tying him to a waggon wheel where he was left overnight. The following day the youth was dead. It was alleged that the accused unfastened the body and threw it into a deep water hole in a river-course. Later the hole was dragged, but no body was found. However 'the evidence in support of the Crown's case was clear'.³⁰ Advocate Kotzé, who appeared on behalf of the Crown, argued that although it was desirable to produce the body of the deceased, a conviction for murder or manslaughter could nonetheless be sustained. The Chief Justice, who was conducting the circuit, adopted the view urged on behalf of the Crown. The jury deliberated for about thirty minutes before returning a verdict of not guilty. According to Kotzé, the Chief Justice addressed

28. G.M. Theal, *The History of South Africa*, Facsimile repr., Cape Town : Struik, 1964, vol.5, p.491.

29. J.G. Kotzé, *Biographical Memoirs and Reminiscences*, Cape Town : Maskew Miller, 1934, p.206.

30. Kotze, op.cit.

the jury in the following manner;³¹

'Gentlemen, I hope you are able to reconcile your verdict with your consciences'.

In 1879 the full impact of racial prejudice was forcefully driven home during the circuit court sessions at Victoria West. White justice was seen at its worst, when the jury refused to convict the perpetrators of the Koegas Massacres in the face of overwhelming evidence. The Koegas murder trials were concerned with incidents which occurred during the Koranna disturbances of 1878. The local commandant reported the killing of men, women and children near Koegas, on the North bank of the Orange River. The case was investigated by an experienced magistrate, and five men were indicted for murder. Two of the accused were charged with shooting male prisoners whom they were escorting, and three were charged with shooting five women and a youth whom they had been ordered to convey to Victoria West. Rose Innes, who was present at the trials, provides the following description of what transpired;³³

'We found the circuit town crowded; it seemed as if not only those on the jury panel, but the entire countryside, had come to attend the trial. Feeling ran high, for a large proportion of the burghers who had been on active service were Victoria West men. The case of Bergman and Hennik was taken first. They had been ordered to escort five Koranna prisoners from the Orange River to Kenhardt; they were mounted and each was armed with a rifle and a revolver. They did not proceed to Kenhardt but went home, and the prisoners vanished. Their story was that their charges, who had been fastened together in couples, had simultaneously freed themselves, and attacked their escort with stones; the shooting which followed had been in self-defence. Unfortunately the evidence

31. Kotze, op.cit., p.207.

32.

33. B.A.Tindall, James Rose Innes, Cape Town OUP, 1949, p.41.

showed that the prisoners had been taken some distance off the road before they were shot. Four skeletons were found and identified, and in each case the skull had been pierced by rifle and revolver bullets; still more unfortunately, one of the five recovered and gave evidence at the trial. he described the whole cold-blooded business, how he had been shot and left for dead, but had managed to free himself and crawl away; he had three bullet wounds, one in the head, the others on the body. The accused were acquitted, amid the cheers of the crowded court.'

In the second trial, there was no doubt that the women and the youth had been shot, but there was some difficulty in identifying the men who shot them. Judge Dwyer, who presided at the trials, instructed the jury that 'neither a verdict of murder nor of culpable homicide was justified in the absence of clear proof of death by identification of the remains'.³⁴ No such evidence was produced, and one of the accused was convicted of assault with intent to do grievous bodily harm and sentenced to five years imprisonment. The other two were acquitted. The Chief Justice, who had previously held in 1877 that it was not essential to produce the corpus delicti in order to sustain a conviction for murder or culpable homicide, subsequently dissented from the circuit ruling, but the jury were bound by it.

The 'Koegas trials' had a sequel when the Attorney-General, Thomas Upington, sued the proprietor and the editor of the Cape Argus for libel.³⁵ Acting on information supplied

34. Tindall, op.cit., p.42.

35. Upington v. Dormer and Solomon (1879) Buch. 240.

by Judge Dwyer and by D.P.Faure, the Supreme Court interpreter, the editor of the Argus attacked the Attorney-General for not properly following up the trials; 'the presumption was, of course, that Mr. Upington did not wish to alienate Dutch political supporters'.³⁶ Rose Innes, who appeared as junior counsel for the plaintiff, was of the opinion that the articles were 'grossly libellous' and that the only point was whether they were a fair comment of the facts.³⁷ The defendants relied on the fact that the Attorney-General had refused to accede to the Crown prosecutor's suggestion that a change of venue should be applied for. However it was proved that the second and more urgent of the two telegrams on the subject only reached Upington after the accused had been arraigned and when a removal would have been impossible, but the court found that he did not know that. The court held that the second article had exceeded the limits of fair comment, and gave judgment for plaintiff in both cases. However the victory was a Pyrrhic one as the damages were nominal. The proprietor, Saul Solomon, had to pay one shilling, and no order was made as to costs. The editor was ordered to pay £5 with costs.

The Chief Justice took the opportunity to address the grand jury on the subject of trial by jury at the opening of the November 1879 criminal sessions at Cape Town. He stated the following;³⁸

'You, at all events, are well aware that in the eye of the law all persons...stand on exactly the same

36. Solomon, op.cit., p.258.

37. Tindall, op.cit., p.43.

38. Walker, op.cit., p.141.

footing... I was deeply pained a few days ago on reading an account of the mode in which justice is administered in this colony, written by the English historian who has made the affairs of South Africa his special study (James Anthony Froude). "Trial by jury", he says, "is the palladium of English liberty. Trial by jury in South Africa acts sometimes as an arrangement by which a white man who has forgotten himself in dealing with a black man may be relieved from the consequences". If he had stopped here we should have been forced to admit that there is but too much truth in that assertion... But the writer proceeds : "In the Cape Colony...an offence of a white man against a black is not regarded as of the same quality as the offence of a black against a white". If that were a perfectly correct description... I should indeed despair of our colony... Again one is forced to admit that cases do occasionally occur in which the description is too true... (But) I state deliberately, after the most ample experience, that, as a general rule, juries in this colony...perform their duties faithfully and honestly... The improvement during the last fifteen years has been most marked... I remember the intense excitement which was caused in one or two outlying districts by the report that some coloured men were to sit upon the jury. I have since that time presided at trials in remote country districts, where white farmers have, without a word of remonstrance, been called out with coloured men... But if there has been improvement in the past, there is still ample room for improvement in the future.'

Six years after de Villiers had delivered his address, an incident occurred in the Eastern districts which illustrated that, although the courts might not have been effective in preventing atrocities by whites against blacks, they certainly gave a fair measure of protection to the whites

who exposed the atrocities. A farmer named Pelser was suspected of shooting an African. However despite many contradictions and improbabilities in his story, the Solicitor-General accepted that Pelser had acted in self-defence, and declined to prosecute him. The Solicitor-General's decision was criticized by Reverend Don, who took the matter up in the press. Don accused the Solicitor-General of a dereliction of duty and stated that Pelser was 'a wretched murderer'.³⁹ Don was indicted for criminal libel, and the case was tried before a judge and jury at Grahamstown. Pelser's supporters, who had threatened to take the law into their own hands if Pelser was charged, attempted to influence the jury. However the jury found in favour of Don, who was praised by the judge and the Cape Law Journal for 'lending himself...to the cause of free discussion and impartial justice'.⁴⁰

8.4. THE HIGH COURT OF GRIQUALAND WEST

8.4.1. INTRODUCTION

Ten days after the Keate Award, Sir Henry Barkly annexed Griqualand West and declared it a British Territory.⁴¹ The territory was divided into three districts,⁴² and provision was made for the establishment of a High Court.⁴³ The court was given similar jurisdiction to the Cape Supreme Court, and its proceedings were governed by the Cape rules. It was constituted as a single-judge court, and the pre-

39. A full report of the case appeared in The Cape Law Journal, vol.2, 1885, p.292.

40. Cape Law Journal, loc.cit.

41. Proclamation No.67 of 1871.

42. Klipdrift, Pniel and Griquatown.

43. Proclamation No.70 of 1871.



THE GRIQUALAND WEST HIGH COURT
KLIPDRIFT

siding officer was called the recorder. Criminal cases were tried by the recorder and a jury of nine men. Appeals went, in the first instance, to the High Commissioner, who could refer them to the Judicial Committee of the Privy Council.⁴⁴ Provision was made for the appointment of a registrar, master and sheriff, and the court was authorized to admit both advocates and attorneys.⁴⁵ Jacob Dirk Barry, a Grahamstown advocate, was appointed as the first recorder of the court, which took its seat at Klipdrift.⁴⁶ John Cyprian Thompson was appointed public prosecutor;⁴⁷ Arthur Tweed as registrar and master and P.L.Buyskes as sheriff.

On 27 November 1871 the court sat for the first time in a corrugated iron building, which was situated on the Northern side of Campbell street.⁴⁸ Mr. Justice De Vos Hugo gives the following description of the grand occasion;⁴⁹

'Voor die middag moes die advokate en prokureurs hul name vir toelating indien en die volgende dag sou die aansoeke verhoor word. Regter Barry het sy ampseed voor mnr. Campbell afgelê. Thompson is beëdig as aanklaer. Die balie is verteenwoordig deur advokate Halkett, Hodges, Shippard en Maasdorp, en die prokureurs deur Arbouin, Ford en Haarhoff. Barkly-Wes was toe nog maar 'n primitiewe plek en die aanklaer en die "gentlemen of the long robe" moes die Maandagaand maar slaap waar hul plek kon vind. So het sommige op biljarttafels en ander onder die toonbanke van goedgesinde handelaars 'n lêplekkie gevind.'

On 30 May 1872 Klipdrift, Pniel and Griquatown were proclaimed as circuit districts,⁵⁰ and on 1 July the court sat

44. In terms of Ordinance No.9 of 1875 appeals went direct to the Privy Council.
45. In 1872 and 1874 the court was authorized to admit conveyancers and notarys respectively.
46. Government Notice dated 22 November 1871.
47. Thompson subsequently became the Attorney-General in 1873.
48. G.F.De Vos Hugo, Honderd Jaar Geskiedenis van die Hooggeregshof in Noord-Kaapland, Government Printers, S.61667-1977.78-30, p.30.
49. De Vos Hugo, op.cit., p.31.
50. Proclamation No.35 of 1872.

for the first time at the farm Vooruitzigt, which was the future site of Kimberley. On 7 February 1873 the territory was granted Crown Colony status and the public prosecutor was appointed Attorney-General. On 3 January 1876 the seat of the court was moved from Klipdrift (Barkly West) to Kimberley, where the court was housed in the Mutual Hall before moving to a wooden building.⁵¹ According to Dr. Matthews the latter structure was a 'wretched tumble down shanty', which was subsequently occupied by the Special Court which had been set up to try offences under the Diamond Trade Act.⁵² Matthews, who was present at a murder trial which was conducted in the Mutual Hall, describes the scene in the following manner;⁵³

'As...night came on, and it became known that the judge proposed sitting till the case was concluded, the Hall was quickly crowded with diggers. Here were men begrimed with dust and coatless as they hurried there, men who had removed the signs of their daily toil; the floor of the Hall was thronged so that none could move; on the window-sills stood men clinging to each other for support, and to the very girders of the roof a number of adventurous youths had climbed; a veritable sea of faces met the eye, as one gazed around. On the stage sat the judge surrounded by the tawdry wings. Some were associated in the spectator's minds with occasions widely different from the background (The Hall had been fitted out for theatrical entertainments). A glimmering light was shed by a row of flimsy Chinese lanterns suspended above, and on the judge's desk were a couple of glittering dips. In front sat the counsel at a table of rough planks, elevated chair high on liquor cases, and behind them were the prisoners mounted on boxes stamped with the battle-axe trade-mark, and bearing the inscription, Henessey's XXX. As the night wore on, the excitement grew intense; the feelings of the

51. Proclamation No.1 of 1876.

52. J.W.Matthews, *Incwadi Yami*, Facsimile reproduction, Johannesburg : Africana Book Society, 1976, p.417. (Originally published in 1887).

53. Matthews, op.cit., p.416.

public were dead against the prisoners, perhaps scarce a score in the vast crowd had a doubt as to their guilt or wished them to escape the murderer's doom. The addresses of the counsel and the charge of the judge were listened to in breathless silence, and then the wearied jury retired. Apparently some doubt existed in their minds, for the verdict of Not Guilty was returned.'

In another murder trial the accused, named 'Brandy and Soda', was found guilty. The judge, having assumed the black cap, addressed the prisoner as follows;⁵⁴

'Brandy and Soda, you have been found guilty by an impartial jury of the awful crime of wilful murder, upon the enormity of which it is unnecessary for me to dilate. "A life for a life" is the law for both the black man and the white, and there is no alternative left me but to pronounce on you the sentence of death. The judgment of this court is that you, Brandy and Soda, be hanged by the neck till you are dead, and may...'

8.4.2. THE GRIQUALAND WEST LAND COURT

On 9 September 1875 the authorities set up a Land Court for the purpose of settling the numerous claims which had arisen as a result of the recently discovered wealth in the diamond fields.⁵⁵ The territory had been regarded as, and appeared to belong to, the Orange Free State prior to the diamond discoveries, but the Crown had laid claim through an alleged title of the Griqua Chief, Waterboer; and after the Keate Award it had been annexed as a British Territory. The Land Court was given jurisdiction to try all cases of claims within the colony. A right of appeal,

54. Matthews, op.cit., p.423.

55. Ordinance No.3 of 1875.

which had to be exercised within three months, lay from the Land Court to the High Court of Griqualand West. If no appeal was lodged within the allotted time, application could be made to the High Court in order to finalize the judgment.⁵⁶ Rules of court were proclaimed on 23 September 1875 and the court commenced sitting at Barkly West the following day.⁵⁷ Advocate Andries Stockenström was appointed as the first and only judge of the court, which moved to Kimberley on 3 January 1876.⁵⁸ On 16 March 1876 he gave his famous judgment in which he made it clear that Waterboer's claim to the territory was unfounded. This knocked the bottom out of the British case for annexation and it was clear that a flood of appeals could be expected against the judgment. President Brand of the Orange Free State took the matter up with the British government and a settlement was reached on 13 July 1876.⁵⁹ The borders were re-adjusted and the Free State received a solatium of £90,000. The Land Court had served its purpose, and according to De Vos Hugo;⁶⁰

'By Ord.13 van 13 Oktober 1876 is toe bepaal dat alle uitsprake waarteen appél aangeteken is en wat nog nie deur die High Court afgehandel is nie na verloop van drie maande na die uitspraak sonder 'n bevel van die High Court finaal sou word. Daarmee was die werk van die Land Court feitlik afgehandel.'

8.4.3. THE GRIQUALAND WEST ANNEXATION ACT OF 1877

In 1877 the Cape Parliament passed an Act⁶¹ which made provision for the incorporation of Griqualand West. From the

56. De Vos Hugo, op.cit., p.41.

57. Proclamation No.21 of 1875.

58. Proclamation No.30 of 1875.

59. De Vos Hugo, op.cit., p.43.

60. De Vos Hugo, op.cit.

61. Act No.39 of 1877.

date of the annexation, the number of puisne judges of the Supreme Court was to be increased from four to five in order to provide for the recorder of Griqualand West.⁶² The High Court was retained and the Supreme Court was given concurrent jurisdiction in the territory. Appeals from the High and circuit courts of Griqualand West were to go, in the first instance, to the Supreme Court, and the rules applying to appeals originating in the Eastern districts were to apply, *mutatis mutandis*, to Griqualand West.⁶³ Pending appeals from the Land Court could, with the consent of the parties, be removed to the Supreme Court.⁶⁴ Provision was made for the removal of pending cases from either of the three courts to one of the others on the grounds of convenience. The rules of the Griqualand West High Court were to remain in force until amended, added to, or rescinded by the judges of the Supreme Court. The Attorney-General's authority was extended to include Griqualand West and provision was made for the appointment of a Crown Prosecutor, with authority similar to that of the Solicitor-General in the Eastern districts. The advocates and attorneys were given reciprocal rights of admission to the Supreme, Eastern Districts and Griqualand West courts.

Although the Griqualand Annexation Act received the royal assent in April 1878, it was only put into operation on 15 October 1880.⁶⁴ However the Act had failed to anticipate the establishment of a Court of Appeal in 1879, and

62. Section 9.

63. Section 10.

64. De Vos Hugo, *op.cit.*, p.56.

it was necessary to amend both Acts in order to render the mode of procedure in all appeals uniform. The amending Act was accordingly passed on 29 July 1880.⁶⁵ It provided that from the date of annexation, the Supreme Court was to consist of the Chief Justice and six puisne judges; the additional judge being the recorder of Griqualand West.⁶⁶ Furthermore appeals which, in terms of the Griqualand West Annexation Act of 1877, were to go to the Supreme Court, now lay to the Court of Appeal.⁶⁷ Finally sections eleven to twenty-nine of Act No.5 of 1879 were to apply, *mutatis mutandis*, to the High Court.⁶⁸

8.5. THE ADMINISTRATION OF JUSTICE ACT OF 1882

In 1882 it had become necessary to increase the number of judges at Kimberley, and on 25 July the Cape Parliament passed an Act⁶⁹ which made the pattern of the courts uniform. The number of judges of the Supreme Court was increased to the Chief Justice and eight puisnes. The number of judges necessary to constitute a quorum of the Supreme Court remained at two, and where a difference of opinion arose between them, the decision of the court was to be suspended until three or four judges could be present. The Judge President of the Eastern Districts Court and the High Court of Griqualand West were expressly authorized to take part in the determination of cases before the Supreme Court. Provision was made for the Supreme Court to order a rehearing of any important case before five or

65. Act No.12 of 1880.

66. Section 2.

67. Section 3.

68. *loc.cit.*

69. Act No.40 of 1882.

more judges.

The Bench of the Griqualand West High Court was increased to three judges, of whom one was to be called the Judge President.⁷⁰ The number of judges necessary to constitute a quorum in the Supreme Court, and the law relating to the powers vested in certain cases in a single judge, were to apply equally to the High Court. In the event of a difference of opinion arising between two of the judges, the decision was to be suspended until all three judges could be present, and the decision of the majority was to constitute the decision of the court. The office of the sheriff of Griqualand West was abolished, and the duties attached to the office were to be performed by deputies appointed by the sheriff at Cape Town.

The constitution of the Court of Appeal was amended so as to give the Judge President of the Griqualand West High Court a seat on the Bench.⁷¹ It now consisted of the Chief Justice, the two Judge Presidents, and two puisne judges who had to be specially assigned to the court.⁷² Appeals to the Court of Appeal against any judgment from the Eastern Districts Court or the High Court of Griqualand, in which only two judges concurred, or against the judgment of any circuit court, had to be heard before not less than three judges of appeal; and every appeal against any unanimous judgment of the three judges of the Eastern Districts Court or the High Court of Griqualand had to be

70. Section 6.

71. Section 13.

72. The two puisne judges at Kimberley were excluded from sitting as appeal judges.

heard before not less than four judges of appeal. If the four appeal judges were equally divided, the decision of the court was to be suspended until all the judges could be present, and the decision of the majority was to constitute the judgment of the court. The Eastern Districts Court and the High Court of Griqualand were authorized to reserve points of law, arising upon review of the judgments or sentences of the inferior courts, for the consideration and determination of the Court of Appeal.⁷³

The Eastern Districts Court was given concurrent jurisdiction with the Supreme Court;⁷⁴

'In and over all causes arising, and persons residing and being within all districts of the colony to the eastward of and including the districts of Humansdorp, Uitenhage, Jansenville, Aberdeen, Murraysburg, Richmond, and Hope Town, and within the territories known as the Transkei and Griqualand East, described in the Transkeian Annexation Act, 1877.'

The Transkeian Annexation Act⁷⁵ had merely provided that the Governor might proclaim any matter relating to the territories cognizable in the colonial courts.⁷⁶ The Administration of Justice Act of 1882 provided for civil appeals to go to either the Supreme or the Eastern Districts courts.⁷⁷ However in 1885 provision was made for appeals to go either to the chief magistrates or to the Cape Supreme or Eastern Districts courts.⁷⁸

8.6. THE SPECIAL COURTS FOR MINING OFFENCES

The Special Courts for Mining Offences,⁷⁹ which were est-

73. Section 16.

74. Section 17.

75. Act No.38 of 1877.

76. Section 3.

77. Section 21 of Act No.40 of 1882.

78. Act No.3 of 1885.

79. Proclamation No.144 of 1882, dated 1 September 1882.

abished under the Diamond Trade Act of 1882, appear to have been the forerunners to trial by judge and assessors in South Africa. They were set up in Griqualand West in an attempt to stamp out the illicit diamond trade, which was seriously undermining the diamond industry. According to Roberts;⁸⁰

'Had anyone in Kimberley been asked to explain the latest economic depression, he would have had his answer ready. The greatest financial evil of the diggings, it was firmly believed, was the loss sustained by the diamond industry through illicit diamond buying. I.D.B. was made to account for every type of failure. Such things as barren claims, unstable markets, business incompetence and sheer bad luck, did not exist as far as Kimberley bankrupts were concerned. Every ruined digger, speculator or company promotor attributed his downfall to the army of thieves and crooked diamond buyers who plagued the diggings. Nothing would convince them otherwise.'

Prior to their establishment, a special court had been set up in Kimberley to try offences committed under Ordinance No.8 of 1880.⁸¹ However the special court, which consisted of a special magistrate, the resident magistrate at Kimberley, and an additional magistrate, was unable to suppress the illegal trade. The more serious cases of I.D.B. had to be referred to the High Court for trial before a judge and jury. According to de Vos Hugo;⁸²

'As 'n saak dan na die High Court toe gaan was die problem om 'n jurie te kry waarop daar nie een of meer onwettige diamant-handelaars gesit het nie.'

It was clear that more stringent measures were needed and in 1881 a Commission of Inquiry was set up to investigate the state of the diamond industry. The result was the

80. Brian Roberts, Kimberley : Turbulent City, Cape Town : David Philip, 1976, p.201.

81. Proclamation No.12 of 1880, dated 14 October 1880.

82. De Vos Hugo, op.cit., p.38.

Diamond Trade Act of 1882.⁸³ When the Bill came up for discussion in the Cape Assembly, it was strenuously opposed by James Leonard, a former Attorney-General. According to Roberts;⁸⁴

'(Leonard) commenced his attack by denouncing the Special Diamond Court... Cases coming before this court were heard by three officials, not always magistrates, and the sentences passed were sometimes reduced or quashed on appeal to the Supreme Court. In Kimberley such reversals were attributed to the quibbles of pettifogging lawyers. Leonard thought differently. "I have seen cases", he thundered, "appealed before the Supreme Court in which convictions have been obtained upon the evidence which I am certain no jury in the country would convict the commonest black man of the most ordinary crime... The Illicit Diamond Court of Griqualand West is a blot on the judicial system of the country which should not be allowed to remain".'

However after great difficulty the Act was passed. It provided for the establishment of Special Courts for the purpose of trying offences under Ordinance No.4 of 1877, Ordinance No.8 of 1880, and Act No.48 of 1882. Every court was to consist of three members, one of whom had to be a judge of the Supreme Court.⁸⁵ The Governor was authorized to proclaim the establishment of a Special Court in any district within the colony. However until 1909 Special Courts were restricted to the districts of Kimberley, Herbert and Hay.⁸⁶ Proceedings were to be governed by the rules and regulations of the magistrates' courts. A right of appeal against conviction lay to either the Supreme Court or the High Court of Griqualand. A further appeal from the High Court to the Court of Appeal was possible,

83. Act No.48 of 1882.

84. Roberts, op.cit., p.205-206.

85. From September 1888 two of the members had to be Judges of the Supreme Court (Act No.34 of 1888).

86. Proclamation No.144 of 1882, dated 1 September 1882.

if leave was granted by the former. All cases cognizable by the Special Courts had to be brought, in the first instance, before a resident magistrate. He had to decide whether to conduct a preliminary examination or to remit the case to a Special Court for trial. In the case where a preliminary examination was conducted, the Attorney-General or the Crown Prosecutor had to decide whether to remit the case for trial before a Special Court or to any other competent court.

8.7. THE ABOLITION OF THE COURT OF APPEAL

On 16 April 1886 the Legislative Council carried a resolution to the effect that 'in the opinion of the Council a great reduction of expenditure might be effected without any detriment to the administration of justice if the number of judges were reduced'.⁸⁷ In effect the resolution called for the abolition of the Court of Appeal and a reduction in the number of judges at Grahamstown and Kimberley. Opposition to the resolution, as was to be expected, came mainly from the Eastern districts. Furthermore it was directed against the proposed reduction of the Eastern Districts Court Bench rather than against the abolition of the Court of Appeal, which had received a mixed reaction. Although the Court of Appeal had commanded great respect, it proved to be both cumbersome and expensive. De Villiers and his Cape Town colleagues tended to lord it over their Grahamstown and Kimberley brethren, and 'the precedence

87. W.H.S. Bell, Our Judicial Establishments and Suggested Changes Therein, Grahamstown : Richards, Slater & Co., 1886, p.3.

given to the Cape Town puisnes galled their brother justices in the other courts'.⁸⁸ The frequent absence of the Judge Presidents delayed the business of the court, and it was felt in certain quarters that the work could be done just as effectively by the Supreme Court. On the other hand the Court of Appeal implied partial recognition of the equality of the Grahamstown and Kimberley courts, 'as they were strictly speaking no longer bound by Supreme Court rulings'.⁸⁹ The fact remained that the Court of Appeal would serve as a useful vehicle for unifying the legal systems in a united South Africa. When Carnarvon's federation scheme failed, in De Villier's eyes, 'its *raison d'être* had disappeared and only its objectionable element remained-the partial recognition of the equality of the other two colonial courts with his own'.⁹⁰ He therefore spoke out in favour of its abolition and supported the resolution which called for a reduction in the number of judges at Grahamstown and Kimberley. However in a letter to the Judge President of the Eastern Districts Court, he stated that 'Kimberley must have two judges to staff its two courts'.⁹¹ It appears that De Villiers was motivated 'partly in the interests of economy, but mainly in those of a system of single-judge courts as defined by him in 1875'.⁹² According to Walker;⁹³

'The Premier, Upington, inflamed the wrath of the Easterners by accusing the Grahamstown judges of "want of loyalty" in that they "had tried to set up... separate systems of criminal procedure", declaring that if they had "entered into the spirit of this Appeal Court Act" abolition would never have been heard of. De Villiers, though approving of the Bill, tried to smooth the ruffled feelings on both sides,

88. Walker, op.cit., p.107.

89. Hahlo and Kahn, op.cit., p.211.

90. Walker, op.cit.

91. Letter dated 9 May 1886. The two courts being the High Court and the Special Court for Mining Offences.

92. Walker, op.cit.

93. Walker, op.cit.

only to receive the somewhat tart rejoinder from Upington that he had accused the Eastern judges not of active but of passive resistance'.

Upington's accusation that the Grahamstown judges 'had tried to set up separate systems of criminal procedure' was directed at the recommendations of the Native Laws and Customs Commission, which had been appointed on 15 September 1880 under the Chairmanship of Sir Jacob Barry, the Judge President of the Eastern Districts Court.⁹⁴ The Commission had recommended that a separate penal code should be introduced for the Transkeian territories. The Transkeian Penal Code, which became law in 1886,⁹⁵ was modelled on the Barry Commission's code.⁹⁶

W.H.S. Bell, a Grahamstown attorney and former Kaffrarian advocate, took up the challenge on behalf of the Easterners. He attacked the resolution of 16 April 1886 and stated that;⁹⁷

'The debate preceding the adoption of the resolution seems to be singularly devoid of real inquiry into the advisability of such a change (apart, of course, from the question of retrenchment), no statistics are quoted, the convenience and rights of the Eastern Province and Griqualand West are not studied, nor is any consideration given to the fact that judges are men of high education and long practice who will not be removed hither and thither, to-day being promoted to the Bench and to-morrow pensioned off. In the case of ordinary civil servants, moving, promoting, and pensioning are occurrences that are more or less expected; but I shall be much surprised if, in the event of the present resolution being adopted by both Houses and the judges who may be pensioned off going away, the Colonial Government will be successful in obtaining the services of a thoroughly competent man to occupy, as judge, any vacancy that may occur.'

94. C.C.Saunders, *The Annexation of the Transkeian Territories, Archives Year Book*, 1976, p.91.

95. Act No.24 of 1886.

96. The two are compared in the *Cape Law Journal*, vol.2., 1885, p.143-8.

97. Bell, op.cit.

Bell pointed out that the proposal to reduce the Eastern Districts Court to a one-judge court, and the High Court of Griqualand to a two-judge court, would result in the following savings;⁹⁸

Two judges Eastern Districts' Court	£3,000
Two clerks to " " "	400
One judge Kimberley	1,750
One clerk to "	300
	<u>£5,450</u>

He stated that;⁹⁹

'To effect this saving it is proposed to disturb the whole of the judicial machinery of the Eastern Province and Griqualand West; to remove judges from Grahams-town and Kimberley who have spent large sums of money upon dwelling-houses in those places upon the faith that the Act of 1879 was a permanent one as were also their appointments, and thus causing great personal loss to them; to interfere with the Bar in those centres, who have also spent money there in the acquisition of landed property on a like presumption of good faith and permanency; to prejudice the vested interests of the inhabitants of the Eastern Province and Kimberley by putting cheap justice beyond their reach; to overwork beyond comparison the single Judges of the Eastern Districts' Court and High Court of Griqualand; to bring the position of a Judge of the Cape Colony into contempt by those who may be best qualified to fill future vacancies; and to put witnesses (who are almost always underpaid) to the great inconvenience and expense of going to Cape Town.'

Finally Bell produced the following Table to demonstrate how far the work of the Eastern Districts Court had increased since it was created a three-judge court :¹⁰⁰

98. Bell, op.cit., p.4.

99. Bell, op.cit., p.5.

100. Bell, op.cit.

	1880	1881	1882	1883	1884	1885
Liquid cases, including motions	89	108	227	580	540	478
Illiquid cases	98	161	177	178	266	204
Reviews of criminal cases	497	935	2067	1885	2419	3194
Voluntary surrenders	70	90	248	390	283	230
Totals	754	1294	2719	3033	3508	4106

Bell's cogent argument had the desired effect and the Government backed down in so far as the proposed reduction in the number of judges was concerned. However it decided to press ahead with its proposal to abolish the Court of Appeal. The Prime Minister stated that 'large appeal courts had been proved in England to be a mistake and that he had as much confidence in De Villiers' court as in any panel of twelve judges'.¹⁰¹ The abolition Bill was hurriedly passed at the close of the 1886 Parliamentary session, and the Court of Appeal was eliminated 'by an obscure provision in an obscure Act'.¹⁰² During the second reading of the Bill,¹⁰³ the Prime Minister stated that;¹⁰⁴

'This Bill was to bring about finality of legal decisions and to prevent the danger of having, in one part of the colony, a system of law having the stamp upon it of a decision of a court in this district, whilst in another part of the country, under exactly the same state of facts, a different interpretation is given to the law. The Bill provided for the Supreme Court of the Colony to become the Court of Appeal, as was the case formerly. After the passing of this Bill the Court of Appeal would cease to exist, and all the power and authorities conferred upon it would be vested in the Supreme Court of the Colony, three judges to form a quorum for the hearing of an appeal from the Eastern Districts Court, the High Court of Griqualand, or any circuit court; it being lawful for any one judge each of the Eastern Districts Court and the High Court of Griqualand to take part in the determination of any cause brought in appeal for the Supreme Court.'

101. Walker, *op.cit.*, p.108.

102. Hahlo and Kahn, *op.cit.*, p.211.

103. Appeal Court and Sheriff's Duties Bill.

104. Cape Parliamentary Papers, Legislative Council Debates, 1886, p.139.

8.8. THE APPEAL COURT AND SHERIFF'S DUTIES ACT OF 1886

The Act,¹⁰⁵ which was passed on 29 June 1886, abolished the Court of Appeal and provided that;¹⁰⁶

'All and singular the powers, duties and authorities conferred upon the said Court of Appeal by Act No.5 of 1879, Act No.40 of 1882, or any other Act of Parliament, shall be vested in the Supreme Court of the Colony.'

Appeals to the Supreme Court against any judgment of the Eastern Districts Court, the High Court of Griqualand, or any circuit court, had to be heard before not less than three judges; one of whom had to be the Chief Justice, and two of them had to be puisne judges specially assigned to the Supreme Court.¹⁰⁷ Provision was also made for the two Judge Presidents and the other puisne judges to take part in the determination of appeals. When appeals were taken against the unanimous judgments of the full Bench of the Grahamstown and Kimberley courts, the appeal judges had to concur before the judgments could be reversed or varied.¹⁰⁸

Provision was also made for the prosecutor or the defendant in any criminal trial, which had been brought on appeal or review before the Eastern Districts Court, the High Court of Griqualand, or any circuit court, from any inferior court, to appeal to the Supreme Court against the judgment of the said Eastern Districts Court, the High Court of Griqualand, or circuit court.¹⁰⁹

105. Act No.17 of 1886.

106. Section 1.

107. Section 2.

108. Section 4.

109. Section 5.

The Act also resolved one of the problems encountered by the attorneys in obtaining prompt payment from the sheriff's office. The sheriff of the colony, the deputy-sheriff for Albany, and the deputy-sheriff for Kimberley were required to lodge moneys received from the proceeds of any immovable property sold in execution with the civil commissioners of the Cape, Albany and Kimberley divisions respectively. When the moneys were required for distribution, the sheriff or his deputies had to address a written order to the civil commissioner, requesting him to pay the sum mentioned to the person or persons entitled thereto.¹¹⁰

8.9. ON AND OFF THE BENCH

In 1878 a Select Committee was set up to inquire into Judge Fitzpatrick's fitness to perform his judicial duties.¹¹¹ According to Kahn;¹¹²

'The Select Committee was a powerful one, containing such eminent figures in the public life of the Colony as Thomas Upington, the Attorney-General, who was Chairman; Saul Solomon, diminutive of figure but giant of intellect; the redoubtable Richard Southey; J.W.Sauer; and A.F.S.Maasdorp, the member for Graaff-Reinet, the future Chief Justice of the Orange Free State and author of The Institutes of Cape Law, then thirty-one years of age, a practising advocate, and real instigator of the inquiry. Andries Stockenström, up to February of that year, was originally a member, but withdrew after the first day of the deliberations.'

The substance of the charges against Fitzpatrick consisted of the following four allegations :¹¹³

110. Section 9.

111. Cape Parliamentary Papers, Appendix to the Votes and Proceedings, A. 6.-'78.

112. Ellison Kahn, The Trials and Tribulations of Mr. Justice Fitzpatrick, South African Law Journal, vol.75, 1958, p.428.

113. Kahn, loc.cit., p.429.

1. Neglect of duty in that he had; (a) failed to take down evidence properly in appealable cases; (b) postponed the opening day of the circuit court at Oudtshoorn from 24 to 26 March 1877, 'he in the meanwhile, going on a pleasure-trip towards the Knysna', causing inconvenience and expense to suitors, jurors, witnesses, attorneys and counsel; (c) delayed judgment for a year in a certain case though reminded to do so on several occasions, causing inconvenience, anxiety and loss to the parties; (d) absented himself from chambers; (e) absented himself from court on a day specially appointed for a sitting, 'the defendant being anxious for an immediate hearing, as he was about to leave for England in one of the mail steamers to sail in a day or two'.
2. That he was 'addicted to habits of intemperance and insobriety' to the prejudice of the administration of justice.
3. That he suffered from physical debility to such a degree as to be unable to perform the duties of his office in a fit and proper manner, in that he could not give a day's attention to judicial work and in the afternoon was as a rule overcome by sleep.
4. That he suffered from 'great mental incapacity which wholly incapacitates him for the performance of his duties as a judge'. In one instance it was alleged that he had directed the jury, where the charge was assault with intent to do grievous bodily harm, that they might find the accused guilty of murder.

When the Committee commenced its deliberations on 28 June 1878, Fitzpatrick, who conducted his own defence, commenced his opening statement by stating that;¹¹⁴

114. Cape Parliamentary Papers, loc.cit., p.xii-xii.

'The only shadow of a shade of anything of the kind that I had (of the charges) was from a gentleman, whose name I may not mention, who said that the charges amounted to this: that I was, like himself, on the shady side of sixty.'

Kahn provides the following concise summary of the proceedings;¹¹⁵

'One by one the witnesses to prove the charges appeared and were examined and cross-examined. First was Maasdorp, who, Fitzpatrick contended in his closing statement, had selected the Committee, naming himself in the process, thus becoming 'my accuser and prosecutor- a witness against me, and one of my judges'. There followed Mr. Advocate Ebenezer John Buchanan, M.L.A., two years later, at the age of thirty-six, to be elevated to the Bench and there to remain for forty not very distinguished years. Then came Mr. Advocate James Weston Leonard, twenty-five years old, of two years' standing at the Bar, the peerless 'Jim', at the threshold of a career that was to lead him to the office of Attorney-General three years later, silk at thirty, and a name as one of the greatest advocates this country has known. Mr. Advocate Sidney Twentyman Jones came next, of four years standing, soon to be elevated to the Bench in 1882 at the age of thirty-three. Denyssen, J., was summoned to produce his notebook containing the notes of a case not yet decided, which he declined to do. His evidence appears rather helpful to Fitzpatrick. Stockenström; the Rev. Mr. Faure (the interpreter), soon to be the protagonist in the great case of Upington v. Saul Solomon & Co.; C.A. Fairbridge M.L.A., attorney-at-law; T.C. Scanlon, M.L.A., attorney-at-law and future Prime Minister; C.H. van Zyl, attorney-at-law, the very learned author of Judicial Practice and Notarial Practice...; several other attorneys and enrolled agents; a magistrate, a deputy-sheriff; a business man; two jurors: all these were also called by Maasdorp to prove the charges.'

115. Kahn, loc.cit., p.430.

Fitzpatrick also called a number of witnesses to give evidence on his behalf one of whom, Colonel G. Dean Pitt, stated;¹¹⁶

'I have never seen him in a state of drunkenness; in the army we have one term, "drunk or not drunk". I have never seen the judge drunk.'

On 26 July Fitzpatrick gave his concluding address to the Committee, and 'after setting out the highlights of his career, he begged indulgence for having adduced, through his physician, his state of health for recent years'.¹¹⁷ He analysed the evidence against him in a masterly manner and:¹¹⁸

'One, two! one, two! And through and through
The vorpal blade went snicker-snack! '

Most of the charges against Fitzpatrick were dismissed by unanimous vote of the Committee. However he decided to retire on pension the following year. Unfortunately he did not live long to enjoy the fruits of his retirement, and he died on 6 February 1880. His place on the Bench was filled by Andries Stockenström, who assumed office on 22 September 1879. Stockenström had been admitted to the Cape Bar on 20 March 1866. He moved to Grahamstown shortly thereafter and built up an extensive practice. In 1876 he was appointed judge of the Griqualand West Land Court,¹¹⁹ and after the work of the court was completed he returned to practice. In August 1877, Simeon Jacob's health gave way and Stockenström was appointed Attorney-General, without a seat in Parliament. He remained in office until the Molteno Ministry was dismissed on 5 February 1878, and once again resumed private practice until his appointment to the Bench. However his health was bad and he collapsed

116. Cape Parliamentary Papers, loc.cit., p.145.

117. Kahn, loc.cit., p.431.

118. Kahn, loc.cit.

119. See 8.4.2.

while on circuit in March 1880. He died on 22 March and Judge Smith was transferred from Grahamstown to fill the vacancy on the Cape Bench. During the 'appealing years', the Chief Justice presided over the Supreme Court and the Court of Appeal, together with Judge Dwyer and Judge Smith. According to Sampson, during the eighties, 'the Chief Justice was a cold, austere man, much feared and little loved'.¹²⁰ Judge Dwyer and Judge Smith generally concurred in the Chief Justice's judgments, 'though Smith often doubted'.¹²¹ Sampson relates the following incident which occurred when advocate Innes returned from a visit to England and enquired of advocate Juta, how Judge Smith was. Juta replied, 'Oh, still dubitante'.¹²² According to Sampson, Judge Smith was 'the kindest of men and when he sat alone on circuit, the firmest'.¹²³ On the other hand, Judge Dwyer appears to have been a most difficult judge to practise before; 'because his moods were so changeable, and he might be affable or very much the reverse, for no apparent reason whatsoever'.¹²⁴ Innes describes the volume of work as small, and states that;¹²⁵

'There was no Chamber Court, one day a week sufficed for provisional work, and the simplest of matters received the united attention of three judges.'

However in 1882 the amount of litigation increased enormously;¹²⁶

'But the "Chief's" judgments were usually terse and to the point; he rarely analysed evidence at length or quoted in detail the authorities he had consulted. It speaks volumes for his perception and quickness of decision that he seldom delayed his judgments over a few days, if not given at once, and he allowed no arrears to accumulate in his Court.'

120. Sampson, op.cit., p.54.

121. Sampson, op.cit., p.55.

122. Sampson, op.cit.

123. Sampson, op.cit.

124. Sampson, op.cit.

125. Tindall, op.cit., p.32.

126. Sampson, op.cit., p.54.

With the promulgation of the Administration of Justice Act on 8 September 1879, provision was made to enlarge the Bench of the Eastern Districts Court from two to three judges.¹²⁷ However the Bench remained under strength until April 1880. Simeon Jacobs had been elevated to the Bench in February 1880, but he was obliged to give up his seat soon thereafter on account of ill health. Judge Smith was transferred to Cape Town in March, and Sidney Godolphin Shippard was appointed to the Bench on 20 April 1880. Ebenezer John Buchanan received an acting appointment nine days later. The following year Buchanan's appointment was made permanent. The Bench remained at full strength under the presidency of Sir Jacob Barry until July 1883, when Judge Shippard was granted a leave of absence. Shippard returned in December and remained on the Bench until 1885, when he resigned to take up the appointment of Administrator and Chief Magistrate of Bechuanaland. The vacancy caused by Shippard's resignation was only filled in November 1885, when Christian George Maasdorp was appointed to the Bench. In 1886, when the Court of Appeal was abolished, the Eastern Districts Court consisted of Sir Jacob Barry the Judge President, Judge Buchanan and Judge Maasdorp.

When the Griqualand West High Court was established in 1871, Jacob Dirk Barry was appointed recorder. John Cyprian Thompson was appointed public prosecutor and the Bar was represented by advocates Halkett, Hodges, Shippard and Maasdorp. When the territory was granted Crown Colony

127. Act No.5 of 1879.

status in 1873, Thompson was appointed Attorney-General. Apparently ill-health prevented him from taking an active part in public affairs, and he was succeeded by Sidney Godolphin Shippard.¹²⁸ Barry resigned the recordership in 1878 in order to take up an appointment on the Eastern Districts Court Bench. Shippard was appointed acting recorder. He eventually followed Barry to Grahamstown. J.S.Lord, who succeeded Shippard as Attorney-General, 'gave up his office in preference to either having to submit to undue interference in the performance of his office or else living in a continual state of "protest"'.¹²⁹ Jacobus Petrus de Wet, the Solicitor-General of the Eastern Districts Court, succeeded Shippard as recorder of the Griqualand West Court. However he resigned in 1880 in order to take up an appointment as Chief Justice of the Transvaal High Court. De Wet was succeeded by James Buchanan, who resigned his appointment as a judge in the Orange Free State in October 1880. When the Griqualand West High Court Bench was increased to three judges in 1882, Buchanan was appointed Judge President.¹³⁰ Sydney Twentyman Jones and Percival Maitland Laurence completed the compliment of judges at Kimberley in September 1882.

8.10. DEVELOPMENTS IN THE FIELD OF JUDICIAL PRECEDENT

During the 'appealing years' judicial precedent was openly recognized as a source of law. In R v. Strydom¹³¹ the Chief

128. Matthews, op.cit., p.417.

129. Matthews, op.cit., p.418.

130. Act No.40 of 1882.

131. (1880) 1 S.C. 60.

Justice made the first reported pronouncement on the stare decisis principle, when he stated the following;¹³²

'I think that it is a sound rule to adhere to, that when once the Court has laid down certain principles, if they are not found to be in direct opposition to the provisions of the law, for the Court to abide by them.'

Two years later in Marsh v. Makein¹³³ de Villier's repeated that it was sound policy for the Supreme Court to follow its former decisions, and he stated that;

'If there be any doubt we ought certainly to follow the previous decisions.'

In Michaelis v. Braun¹³⁴ he referred to the case of Botha v. Brink,¹³⁵ and stated that;¹³⁶

'(It) would be binding upon us even if not quite consistent with the passage of Grotius.'

Prior to the establishment of the Court of Appeal in 1879, the Eastern Districts Court was bound to follow the decisions of the Supreme Court to which appeals lay. However after the establishment of the Court of Appeal, appeals from the Eastern Districts Court no longer went to the Supreme Court, and it was not explicitly bound to follow the latter's decisions. Until the annexation of Griqualand West in 1880, appeals from the High Court went direct to the Judicial Committee of the Privy Council. After annexation appeals had to go, in the first instance, to the Court of Appeal. Thus from its inception in 1871, and until the abolition of the Court of Appeal in 1886, the High Court of Griqualand was not expressly bound by the decisions of the Supreme Court. However, in practice, the Court of Appeal was really the Supreme Court sitting under another name, and the judges at Grahamstown and

132. (1880) 1 S.C. 61.

133. (1882) 2 S.C. 104.

134. (1886) 4 S.C. 205.

135. (1878) 3 Roscoe 30.

136. (1886) 2 S.C. 205 at 208.

Kimberley stood the risk of having their decisions overruled if they stepped out of line by not following the decisions of the Supreme Court. Furthermore the two Judge Presidents had practised for a number of years at the Cape Town Bar, and both were conversant with the decisions of the Supreme Court. Judge Buchanan had edited the Menzies Reports; and Judge Barry had informed the Chief Justice that the Eastern Districts Court had always followed the decisions of the Supreme Court, 'save for one volume of one term when he was absent'.¹³⁷

The importance of judicial precedent was further evidenced by the rapid growth in the publication of law reports. The current reports of the Court of Appeal,¹³⁸ the Supreme Court,¹³⁹ the Eastern Districts Court,¹⁴⁰ and the High Court of Griqualand¹⁴¹ began to be printed on a regular basis. Furthermore most of the early decisions of the Cape Supreme Court had already been published.

137. Walker, *op.cit.*, p.108.

138. Buchanan's Appeal Cases. Cape Appeal Court Reports. Vol.1 : 1880-4. edited by Mr. Justice James Buchanan and Mr. Justice E.J.Buchanan. Published in 1885.

139. Cape Supreme Court Reports. 27 vols. Published in 1882-1910.

140. Reports of the Eastern Districts Court of the Cape of Good Hope. Vols. 1-5 : 1880-7.

141. Reports of the High Court of Griqualand. Vol.1. : 1882-3; vol.2 : 1883-4; vol.3 : 1884-5; vol.4 : 1886-7.

CHAPTER NINE

9. TWILIGHT YEARS

9.1. INTRODUCTION

Although the fundamental structure of the three superior courts remained unchanged until 1904, a number of important developments took place during the twilight years. The grand jury was finally abolished in 1885,¹ and the laws governing trial by jury in both criminal and civil cases were amended and consolidated.² In 1888 the British Foreign Office decided to rationalize its foreign jurisdiction by consolidating the Foreign Jurisdiction Act³ and by issuing a comprehensive Order in Council for Africa. In terms of the Africa Order in Council,⁴ the basis for consular jurisdiction throughout the continent was firmly established. In practice, four local jurisdictions were established,⁵ and the consuls' judicial powers were properly regulated and defined. Provision was also made for the appointment of a number of Courts of Appeal; and in 1890 the Cape Supreme Court was given appellate jurisdiction under the Africa Order in Council.⁶ Another significant development occurred in 1891, when the Cape Supreme Court took over the functions of the Vice-Admiralty Court.⁷

In 1892⁸ the law relating to the admission of advocates and

1. Act No.17 of 1885.

2. Acts No.22 and 23 of 1891.

3. 6 & 7 Vict., c. 94 as amended.

4. 15 October 1889. (London Gazette dated 22 October 1889).

5. One in the Oil River Protectorate, another for the Congo Free State, one in the British sphere on the East Coast exclusive of the Dominions of the Sultan of Zanzibar, and one for the British sphere North of the Zambesi.

6. Act No.3 of 1890.

7. The Colonial Courts of Admiralty Act of 1890 (53 & 54 Vict., c.27).

8. Act No.30 of 1892.

attorneys was amended so as to provide for the admission of practitioners from the neighbouring States on a reciprocal basis. However de Villiers was only successful in 'securing the "half-loaf" of admission to the Cape Bar of all those who took their LL.B. degree in any State in South Africa',⁹ and 'Union itself failed to level the barriers between one State Bar and another'.¹⁰

Problems were also experienced in the Transkeian territories, where the magistrates continued to recognise and apply the African customary law. The Supreme Court refused to recognise the validity of the system when cases went on appeal, and the circuit court judges had 'already struck down a number of magisterial decisions in lobolo cases when in December 1893 the Supreme Court ruled that African customary marriages were illicit unions'.¹¹ According to Saunders;¹²

'The chief magistrates told the government that the "revolution" this judgment implied threatened the stability of the territories. A Bill was therefore introduced in 1894 providing that civil suits involving Africans East of the Kei were to go on appeal to a newly constituted "Native Territories Appeal Court", composed of one Chief Magistrate and two assessors.'

The Bill entered the Statute book as the Native Territories Appeal Act of 1894.¹³ The Act was subsequently amended in 1898¹⁴ in order to provide a right of appeal from the civil judgments of the Chief Magistrate to the Supreme Court, in cases where one of the parties was white.

9. Eric A. Walker, Lord de Villiers and His Times : South Africa 1842-1914, London : Constable & Co., 1925, p.113.

10. Walker, op.cit., p.114.

11. C.C.Saunders, The Annexation of the Transkeian Territories, Archives Year Book, 1976, p.128.

12. Saunders, op.cit.

13. Act No.26 of 1894.

14. Act No.32 of 1898.

In 1895 the jurisdiction of the Supreme Court and the High Court of Griqualand was extended when the territory of British Bechuanaland was annexed to the Cape Colony.¹⁵ In the previous year the Supreme Court was empowered to hear appeals from the Matabeleland High Court,¹⁶ and in 1896 the law relating to the administration of justice was consolidated and amended.¹⁷ In 1898 the jurisdiction of the Supreme Court was further extended in order to enable it to hear appeals from the High Court of Southern Rhodesia.¹⁸

In 1900 a Special Court was established for the trial of cases of High Treason and crimes of a political character.¹⁹ During the lifetime of the Special Court, the quorum of the Supreme Court, the Eastern Districts Court, and the High Court of Griqualand was reduced to a single judge.²⁰ In 1904 the Treason Court and the Special Courts for the trial of Mining Offences were abolished, and single judge courts, termed Divisional Courts, were established.²¹ The Divisional Courts were empowered to sit at all times, and appeals lay to the Supreme Court in its appellate capacity. The Act further amended the Native Territories Penal Code, and provided that all criminal cases, which had previously gone on review to the Chief Magistrate, had to be forwarded to the superior courts of the colony. Furthermore all appeals arising out of criminal and civil cases heard in the courts of the resident magistrates in the territory had to be taken to the superior courts of the colony.

15. Act No.41 of 1895.

16. Matabeleland Order in Council, dated 18 July 1894.

17. Act No.35 of 1896.

18. Southern Rhodesia Order in Council, dated 20 October 1898.
See also the Supreme Court Extended Appellate Jurisdiction Act, No.22 of 1898.

19. Act No.6 of 1900.

20. Section 10.

21. Act No.35 of 1904.

In 1905 the Divisional Courts were empowered to hear appeals from the resident magistrates' courts.²² The Act further provided that in cases of appeal from the judgment of a Divisional Court, the judge in question was to be disqualified from sitting as a member of the Appeal Court. In 1907 the High Court of Griqualand was reduced to a single judge court, and provision was made for the Judge President to retire on pension on 1 July 1907.²³

Finally when the union of Southern African States was achieved in 1909, a single Supreme Court of South Africa was established 'with an Appellate Division at its apex, and provincial and local divisions at its foundations'.²⁴ The Cape Supreme Court became a provincial division of the Supreme Court, and the Eastern Districts Court, the High Court of Griqualand, and the various circuit courts became local divisions.²⁵ The Cape superior courts retained their original jurisdiction and jurisdiction to hear appeals from inferior courts. The existing judges retained office with the same rights to salary and pensions as had prevailed in the colonies.

During the twilight years, the Eastern Districts Court remained under the constant 'shadow of dismemberment'.²⁶ For many years;²⁷

'The prescribed quota of judges was not kept up; and bitter complaints appeared in the press and on platforms. The very existence of the Court was almost at stake at the turn of the century, owing to this neglect.'

22. Act No.9 of 1905.

23. Act No.29 of 1906.

24. Hugh Corder, Judges at Work : The Role and Attitudes of the South African Appellate Judiciary, 1910-50, Cape Town : Juta, 1984, p.21.

25. South Africa Act, 1909 (9Edw. 7, c.9).

26. H.R.Hahlo and Ellison Kahn, South Africa : The Development of its Laws and Constitution, London : Stevens; Cape Town : Juta, 1960, p.212.

27. George Randell, Bench and Bar of the Eastern Cape, Grahamstown : The Author, (1985).

Cloete refers in this connection to a legal dinner which was held at Steinmann's Hotel in Grahamstown on 2 February 1907, and states that;²⁸

'H. Lardener-Burke, K.C., (the) Solicitor-General, in proposing the toast to the Bench referred to the fact that not since 28th February, 1900, had 3 judges, permanently appointed and definitely assigned to the Eastern Districts Court, sat together in Grahamstown until the 1st February 1907.'

Furthermore it appears that;²⁹

'For a considerable period during and after the nineties of the last century the civil work of the Court was slack and supported only a small Bar and Side Bar. Its civil work during that time was reported by meagre law reports. What, however, went unchronicled was the immense criminal circuit work undertaken by the Court. After 1904 when Sir John Kotzé became Judge-President a great change supervened. The Court carried its proper compliment of 3 judges and grew in stature until in 1911 it supported a Bar of twenty advocates, as many as fourteen of whom used to travel together on circuit. The law reports of those years showed an increasing record of important civil work, equalled at time only by the Supreme Court of the Transvaal and in Cape Town.'

The High Court of Griqualand did not fare as well as the Eastern Districts Court. It managed to retain its full component of three judges until 1907, when it was reduced to a single judge Court. The fact that it continued to function as a three-judge court for so long can be ascribed to the necessity for maintaining the Special Courts for the trial of Mining Offences. When the government decided to increase the quorum of judges of the Special Courts from one to two in 1888, the Kimberley judges voiced their opposition in the following terms;³⁰

28. J.D.Cloete, A Chronicle to mark the Centenary of the Eastern Cape Division of the Supreme Court, Grahamstown, 1964, p.4.

29. Cloete, loc.cit., p.5.

30. The Cape Law Journal, vol.5, 1888, p.198-9.

'The judges here have always regarded their share of the Special Court work as roughly corresponding to the share of Circuit work taken by each judge of the other courts, in which latter work, however, the Judges of the High Court have always been ready to assist whenever convenient and practicable; but the work of sitting as a judge of fact in criminal cases is nowhere else imposed on Judges of the Superior Courts; it is certainly the most disagreeable portion of their duties; and while prepared to do their utmost to perform any duties which the Legislature think proper to impose upon them, they cannot regard with satisfaction the probable effect and operation in this clause, if passed in its present shape.'

Notwithstanding the judges' opposition the necessary Act³¹ was passed, and from 1 September 1888 two judges were required to preside over the Special Courts.³² This remained the position until 1904 when the Special Courts were abolished, and I.D.B. cases were once again tried before a judge and jury.³³ In 1895 the Cape Colony annexed the territory of British Bechuanaland and the High Court was given concurrent jurisdiction together with the Supreme Court in the districts of Mafeking, Vryburg and Tuang.³⁴ According to De Vos Hugo;³⁵

'Daarmee is die jurisdiksiegebied van die High Court met 12,865,000 ha vergroot. Saam met die 4,610,000 ha van Griekwaland-Wes het die jurisdiksiegebied dus 17,475,000 ha beslaan.'

From 1905 the Judge President, P.M.Laurence, was pre-occupied with the business of the Supreme Court at Cape Town. Judge Lange was appointed acting Judge President from 1905 to 1907. In 1906 Judge Hopley was transferred to Cape Town and the High Court of Griqualand was reduced to a single judge court.³⁶

31. Act No.34 of 1888.

32. Government Notice No.716 of 1888.

33. Act No.35 of 1904.

34. Act No.41 of 1895.

35. G.F.De Vos Hugo, Honderd Jaar Geskiedenis van die Hoogeregshof in Noord-Kaapland, Government Printer (S.61667-1977.78-30), p.69.

36. Act No.29 of 1906.

With the abolition of the Court of Appeal in 1886, the Eastern Districts Court and the High Court of Griqualand were bound to follow the decisions of the Cape Supreme Court. In so far as de Villiers' court was concerned this in effect meant the decisions of the Chief Justice. In the case of Jacobson v. Nitch³⁷ the Chief Justice explained that;³⁸

'Stare decisis is a rule which commends itself on the ground of its justice no less than on the ground of its expediency.'

Thus according to Kahn;³⁹

'In the pre-Union Cape Colony a doctrine of stare decisis was recognized explicitly because of its expediency and its equity in giving expression to legitimate expectations. A pronouncement of the highest court, though it could be rejected by the court itself if clearly shown to be wrong, was (subject to certain exceptions) absolutely binding on the other courts.'

This was made clear in the case of Ex parte Ziedler⁴⁰ where the High Court of Griqualand stated that however it might have decided the case in the light of the Roman Dutch authorities cited, had it been res integra, it was bound by the decision of In re Booysen.⁴¹ Anders points out, however, that;⁴²

'Some of the old cases in the Cape reports are very briefly reported, and the grounds of the judgment are often obscure; in such cases the precedents there recorded have afforded little or no guide to later judges, who have at times been constrained to regard the point for decision as res integra.'

From 1904 when the judges at Cape Town, Grahamstown and Kimberley could sit as Divisional Courts consisting of

37. (1890) 7 S.C. 174.

38. (1890) 7 S.C. 174 at 178.

39. Ellison Kahn, The Rules of Precedent Applied in South African Courts, South African Law Journal, vol.84, 1967, p.46.

40. (1897) 8 H.C.G. 136.

41. (1880) Foord 187.

42. C.P.Anders, Judges and Judgment, South African Law Journal, vol.27, 1910, p.373.

one judge for the trial of civil matters, it would appear that;⁴³

'No Bench-not even one of a single judge-need have followed the ruling of a Divisional Court.'

Anders states that the Divisional Courts occasioned a divergence of views on some important legal questions, and explains that;⁴⁴

'A decision of such a Divisional Court is not binding on another court, as Judge-President Kotzé pointed out in Chinn v. Chinn 1908 E.D.C. 439 (though the dictum is not there reported), although they (the Eastern Districts' judges), said he, were certainly bound by the decisions of a full Supreme Court.'

In the case of Henderson v. Hanekom⁴⁵ the Chief Justice drew attention to the distinction between the ratio decidendi and an obiter dictum when he stated that an obiter was not intended to decide a question not then before the court, and was therefore not a previous decision.

The recognition of judicial precedent as a source of law and the acceptance of the stare decisis principle was subjected to the following criticism in 1893;⁴⁶

'There is a strong tendency springing up of degenerating our Cape Law System into Case Law; in making it a collection of precedents... (O)ur reports are getting voluminous. Our barristers are getting into the position of being able (in many cases) to quote So v. So instead of Voet, Van Leeuwen, Grotius, Van der Linden and other authorities, and stare decisis is the general cry, even echoed by our Judges.'

Finally of the 24 cases which were taken on appeal to the Judicial Committee of the Privy Council during the period 1880-1910, 15 were upheld and 8 were upset.⁴⁷ The remaining case was upheld on the first action, but was reversed on the second.

43. Kahn, loc.cit., p.47.

44. Anders, loc.cit.

45. (1903) 20 S.C. 517.

46. The Cape Law Journal, vol.10, 1893, p.214.

47. See ANNEXURE II for a Table depicting the cases which were taken on appeal.

9.2. TRIAL BY JURY

In 1885⁴⁸ the system of grand juries, which had been established in 1828, was finally abolished. During its lifetime it had been restricted to criminal trials in the Supreme Court, and had been condemned as a useless anomaly. It provided that no criminal trial could take place before the grand jury had returned a 'true bill', 'notwithstanding the protection afforded by a preparatory examination and the need for the Attorney-General to decide to indict'.⁴⁹ However the lists of grand jurors were retained for the purpose of selecting juries in civil cases as provided by Act No.30 of 1874,⁵⁰ and to render grand jurors liable to serve as petty jurors in the Supreme Court.

On 1 December 1891 an Act⁵¹ was promulgated to amend and consolidate the law relating to juries. Provision was made for the appointment of 'special jurors' who had to :⁵²

- a) Own immovable property to the value of one thousand pounds; or
- b) be the occupier as a tenant of property to the value of one thousand five hundred pounds; or
- c) although neither the owner nor occupier of immovable property, be described in the jury lists as an architect, a civil engineer, a broker, manager of a bank, manager or secretary of a fire or life assurance company or society, or of any company for the administration of estates, or be in the receipt of salary amounting to five hundred pounds per annum.

The prosecutor or the accused could apply to the Supreme Court, the Eastern Districts Court or the High Court of

48. Act No.17 of 1885.

49. Hahlo and Kahn, op.cit., p.213.

50. See 7.6.

51. Act No.22 of 1891.

52. Section 6.

Griqualand for an order directing that the trial should be conducted by a special jury.⁵³

It appears that the underlying purpose behind the introduction of special juries was to avoid the possibility of 'Koegas-type' trials from recurring.⁵⁴ On 1 December 1891, the law relating to trial by jury in civil cases was also amended.⁵⁵ The Act reiterated that questions of law were to be reserved for the court alone. Trial by jury was extended to the Eastern Districts Court and the High Court of Griqualand at the option of either party, where the amount of damages exceeded one hundred pounds.⁵⁶ Where the amount of damages was less than one hundred pounds, either party could apply to court for leave to try such a case by jury.⁵⁷ Furthermore provision was made for the jurors to be selected from the list of special jurors in the manner provided and directed under Act No.22 of 1891. Civil juries, however, proved a failure,⁵⁸ and in Griqualand West they were never resorted to.⁵⁹

9.3. THE AFRICA ORDER OF COUNCIL OF 1889

On 11 July 1890 the Supreme Court was authorized to hear appeals from any court acting under the Africa Order in Council of 1889.⁶⁰ The Africa Order in Council, which was brought into force on 15 October 1889, was part of the British Foreign Office's effort to rationalize its foreign jurisdiction in Africa. The Order laid down the basis for

53. Section 28.

54. See 8.3.

55. Act No.23 of 1891.

56. Section 6.

57. Section 7.

58. See in this regard; Stiglingh v. Rhodes 8 C.T.R. 528; Michau v. Ashe 19 S.C. 517; Winterbach v. Heatlie 9 C.T.R. 604.

59. De Vos Hugo, op.cit., p.60.

60. The Supreme Court Appellate Jurisdiction Extension Act, No.3 of 1890.

consular jurisdiction throughout the African continent.⁶¹ Four local jurisdictions were established, and the consul's judicial powers were properly regulated and defined. According to Palley;⁶²

'The consuls were authorized to make Queen's Regulations for the peace, order, and good government of subjects with the approval of the Secretary of State, who was given powers to apply to such areas laws of any of the African possessions with modifications and adaptations.'

It appears that the indigenous peoples were not liable to the jurisdiction regulated by the Africa Order unless the ruler of a protectorate 'had consented to the exercise of jurisdiction over his subjects, or unless they were British protected persons'.⁶³ Although the Africa Order was intended to operate within the British sphere of influence North of the Zambesi,⁶⁴ provision was made for the Cape Supreme Court to sit as a Court of Appeal for the purpose of hearing appeals from the consular courts of law. The Supreme Court, when sitting as a Court of Appeal under the Africa Order, was obliged to determine any matter brought before it;⁶⁵

'In accordance with the law which the Court from which such matter is brought either on appeal or upon a case stated in writing may, by the aforesaid Order in Council, or by any other order, law or rule binding upon the said Court, lawfully apply to the decision and determination of such matter.'

However, as far as can be ascertained, the Supreme Court was never called upon to exercise appellate jurisdiction over a consular court operating North of the Zambesi.

61. See the London Gazette dated 22 October 1889 for the full text.

62. Claire Palley, The Constitutional History and Law of Southern Rhodesia 1888-1965 : With special reference to Imperial Control, Oxford : Clarendon Press, 1966, p.57.

63. Palley, op.cit., p.78.

64. Palley, op.cit., p.57.

65. Act No.3 of 1890, section 5.

9.4. THE VICE-ADMIRALTY COURT

9.4.1. INTRODUCTION

The Court of Vice-Admiralty at the Cape of Good Hope was an offshoot of the Court of Admiralty in England. It had been established in 1797 by a Commission of the High Court of Admiralty. The High Court of Admiralty, which had been created by Royal Prerogative in the Seventeenth Century,⁶⁶ developed independently of the common law courts. It administered a system of law derived from customs containing elements of Civil Law, which included the right to bring actions in personam and in rem against ships.⁶⁷

The Courts of Admiralty and Vice-Admiralty had two branches, known respectively as the Instance Court, which exercised normal Admiralty jurisdiction, and the Prize Court. The latter was called into operation only in the event of war;⁶⁸

'To condemn or otherwise deal with ships and goods seized jure belli by the naval forces of the Crown, including those taken in land expeditions in which naval forces were engaged.'

A right of appeal lay from the decisions of the Colonial Vice-Admiralty Courts to either the High Court of Admiralty or to the Privy Council, depending on whether the Vice-Admiralty Court had been commissioned by the High Court of Admiralty or by the Sovereign.⁶⁹ Appeals from the Prize Courts lay to a Committee of Privy Councillors and Judges, which was known as the Lords Commissioners of Appeals in Prize Causes.⁷⁰

66. Kenneth Roberts-Wray, Commonwealth and Colonial Law, London : Stevens, 1966, p.467.

67. Roberts-Wray, op.cit.

68. Roberts-Wray, op.cit., p.472.

69. Roberts-Wray, op.cit., p.468.

70. Superseded by the Judicial Committee of the Privy Council in 1833.

When the Cape Supreme Court was established in 1828, Sir John Wylde was commissioned as a judge of the Vice-Admiralty Court.⁷¹ He took over the office from Judge Kekewich, who had been elevated to the Supreme Court Bench. The Cape Vice-Admiralty Court, which existed independently of the Supreme Court, exercised concurrent jurisdiction with the latter in Admiralty causes. In practice therefore it was possible to have one's suit determined by either court. The choice of forum was by no means academic as two systems of law were in operation. The Supreme Court was obliged to apply the Roman Dutch Law, whereas the Vice-Admiralty Court applied the principles of English Admiralty Law.⁷²

9.4.2. PRACTICE, FEES AND JURISDICTION

On 23 June 1832 the English Parliament passed an Act⁷³ for the purpose of regulating the practice and fees in the Colonial Vice-Admiralty Courts. The jurisdiction of the courts also received attention. The Privy Council was authorized to make rules and regulations 'touching the practice to be observed in suits and proceedings in the several Courts of Vice-Admiralty'.⁷⁴ The rules, regulations and tables of fees had to be entered in the public record books of the courts, and copies had to be 'constantly hung up and preserved in some conspicuous part of the court, and in the office of the registrar'.⁷⁵ The Act further provided that whenever a ship, or the master thereof, had

71. The future Chief Justices were all commissioned as Vice-Admiralty Court Judges.

72. *Smith v. Davis* (1878) 8 Buch. 66.

73. 2 W.1V., c.51.

74. Section 1.

75. Section 4.

come within the local limits of any Vice-Admiralty Court, proceedings could be commenced before the court, notwithstanding that the cause of action might have arisen outside the limits of the court's jurisdiction.⁷⁶

9.4.3. THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The Judicial Committee Act of 1833⁷⁷ provided that from 1 June 1833 all appeals or applications in Prize actions and all other actions and proceedings in the Admiralty and Vice-Admiralty Courts, which had previously been made to the High Court of Admiralty or to the Lords Commissioners in Prize Causes, had to be made to the Judicial Committee of the Privy Council. The registrar of the High Court of Admiralty was obliged to attend the proceedings of the Judicial Committee when Admiralty matters were being considered, and he was authorized to transact, perform, and do all acts, matters, and things necessary in respect of the appeals.⁷⁸

In 1843 provision was made for appeals to be heard by not less than three members of the Judicial Committee.⁷⁹ The Judicial Committee was authorized to make interlocutory orders and decrees, to administer all oaths and affirmations, and to do all things necessary, which the Admiralty Courts were empowered to do before the powers of appeal had been transferred to the Judicial Committee. Appeals had to be conducted in the same form and manner,

76. Section 6.

77. 3 & 4 W.1V., c. 41.

78. Section 29.

79. 6 & 7 V., c. 38.

and by the same persons and officers, as if the appeals had been made to the High Court of Admiralty or to the Lords Commissioners in Prize Causes. All appeals from the Vice-Admiralty Court of the Cape of Good Hope had to be lodged with the registrar of the High Court of Admiralty within twelve calendar months from the 'giving or pronouncing of any order, decree, or sentence appealed from'.⁸⁰ The Judicial Committee was further authorized to make rules, orders, and regulations respecting the practice and mode of proceedings in all appeals from the Vice-Admiralty Courts. Finally it was granted the same power for punishing contempt, compelling appearances, and enforcing judgments as had been granted to the Judge of the High Court of Admiralty under the Admiralty Act of 1840.⁸¹

9.4.4. THE ADMIRALTY ACTS OF 1840 AND 1861

In 1840⁸² and in 1861⁸³ the jurisdiction of the High Court of Admiralty was extended. However, these Acts did not then apply to the Vice-Admiralty Court at the Cape of Good Hope. This was confirmed in the case of Crooks & Co. v. Agricultural Cooperative Union Ltd⁸⁴ where it was stated that;

'The law administered in the Vice-Admiralty Courts prior to 1890 was the General Maritime Law, as received and administered in the High Court of Admiralty, the jurisdiction being that of the High Court of Admiralty prior to the passing of the statutes extending that Court's jurisdiction, save in so far as it was affected by subsequent legislation.'

80. Section 11.

81. Section 7.

82. 3 & 4 V., c. 65.

83. 24 & 25 V., c. 10.

84. 1922 AD 423.

Furthermore in The Yuri Maru⁸⁵ case it was stated that the British Parliament legislated for the Vice-Admiralty Courts;

'Not by reference to the powers of the High Court of England, but by a scheduled statement of causes of action in respect of which jurisdiction was newly conferred.'

9.4.5. THE VICE-ADMIRALTY COURTS ACT OF 1863

In terms of this Act⁸⁶ the Vice-Admiralty Courts were expressly granted jurisdiction in the following matters :⁸⁷

1. Claims for seamen's wages.
2. Claims for master's wages, and for his disbursements on account of the ship.
3. Claims in respect of pilotage.
4. Claims in respect of salvage of any ship, or of life or goods therefrom.
5. Claims in respect of towage.
6. Claims for damage done by any ship.
7. Claims in respect of bottomry or respondentia bonds.
8. Claims in respect of mortgage where the ship has been sold by a decree of the Vice-Admiralty Court, and the proceeds are under its control.
9. Claims between the owners of any ship registered, in the Possession in which the Court is established, touching ownership, possession, employment, or earnings of such ship.
10. Claims for necessities supplied, in the Possession in which the Court is established, to any ship of which no owner or part owner is domiciled within the Possession at the time of the necessities being supplied.
11. Claims in respect of the building, equipping, or repairing within any British Possession of any ship of which no owner or part owner is domiciled within the Possession at the time of the work being done.

85. (1927) AC 906 (PC) 913.

86. 26 & 27 V., c. 24.

87. Section 10.

Jurisdiction was also confirmed in the following matters :⁸⁸

1. In all cases of breach of the Regulations and Instructions relating to Her Majesty's Navy at sea.

2. In all matters arising out of Droits of Admiralty.

The Act in no way restricted the jurisdiction conferred upon any Admiralty Court in respect of;⁸⁹

'Siezures for breach of the Revenue, Customs, Trade, or Navigation Laws, or of the Law relating to the abolition of the slave trade, or to the capture and destruction of pirates and pirate vessels, or any other jurisdiction lawfully exercised by any other Court within Her Majesty's Dominions.'

The Cape of Good Hope Vice-Admiralty Court was expressly given jurisdiction in matters where the cause of action had arisen beyond the limits of the colony.⁹⁰ Furthermore the period of time within which an appeal had to be lodged was reduced from twelve to six months.⁹¹

9.4.6. THE VICE-ADMIRALTY COURTS ACT OF 1867

On 15 July 1867 the British Parliament passed an Act⁹² to amend and extend the Vice-Admiralty Courts Act of 1863. The 1867 Act authorized a judge of any Vice-Admiralty Court to appoint one or more deputy judges to assist or represent him in the execution of his judicial powers. The written approval of the local Governor had, however, to be obtained before such an appointment could be made. The deputy judges were entitled to exercise all the powers of a judge of Vice-Admiralty, and they were authorized

88. Section 11.

89. Section 12.

90. Section 13.

91. Section 23.

92. 30 & 31 V., c. 45.

to hold court at the seat of government or elsewhere in the colony. If necessary, the judge could summon the deputy judges to join him on the Bench, and in the event of the court being equally divided, the decision of the judge was to prevail. The Vice-Admiralty Judge was authorized to direct the place where, and the time when, the deputy judges were to hold court. He could also direct which cases were to be heard by the deputy judges, and he could make arrangements for the regulations of the proceedings in the courts. If he thought fit, he could, with the written approval of the Governor, revoke the appointments of the deputy judges. He was also authorized to appoint deputy registrars and marshals, and could dismiss these officers without recourse to the Governor. The Admiralty, however, retained the right to dismiss any of the officers appointed under the Act. Provision was made to allow all persons, who were entitled to practise as advocates, barristers, proctors, solicitors, or attorneys in the superior courts of a British Possession, to practise in the same respective capacities in the Vice-Admiralty Courts of that Possession.⁹³ Finally the Act confirmed the jurisdiction and authority of the existing Vice-Admiralty Courts.⁹⁴

9.4.7. OFFENCES COMMITTED WITHIN THE JURISDICTION OF THE ADMIRALTY

In 1849 an Act⁹⁵ was promulgated by the British Parliament

93. Section 15.

94. Section 16.

95. 12 & 13 V., c. 96.

in order to provide for the 'Prosecution and Trial in Her Majesty's Colonies of Offences committed within the jurisdiction of the Admiralty'. If any person in a colony was charged with any offence committed on the sea, or in any haven, river, creek, or place, where the Admiral had jurisdiction, or if a person so charged was brought for trial to any colony;⁹⁶

'Then, and in every such case, all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in such colony shall have and exercise the same jurisdiction and authorities of inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorized, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for and auxiliary to and consequent upon the trial of any such person for any such offence wherewith he may be charged as aforesaid, as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of the colony, and within the limits of the local jurisdiction of the courts of criminal justice of such colony.'

However the Act provided that in the event of a conviction, the person so convicted had to be sentenced according to the Laws of England.⁹⁷ The Act also conferred similar jurisdiction for the trial of an offence in respect of the death of a person who died in the colony from an injury inflicted outside the territorial limits of the colony.⁹⁸

96. Section 1.

97. Section 2.

98. Section 3.

9.4.8. THE GENERAL LAW AMENDMENT ACT OF 1879

The General Law Amendment Act,⁹⁹ which was passed by the Cape Parliament in 1879, made drastic inroads into the Roman Dutch Law at the Cape, and has been described as the 'high-water mark of English influence'.¹⁰⁰ Amongst other radical changes, it provided that;¹⁰¹

'In all questions relating to maritime and shipping law in respect of which the Supreme Court had concurrent jurisdiction with the Vice-Admiralty Court, the law of this Colony shall hereafter be the same as the law of England, so far as the law of England shall not be repugnant to, or inconsistent with, any Ordinance, Act of Parliament, or other statute having the force of law in this Colony.'

The significance of the abovementioned section lies in the fact that prior to the amendment, the Supreme Court applied Roman Dutch Law when determining maritime and shipping causes. On the other hand, the Vice-Admiralty Court applied English Admiralty Law. In so far as these systems differed, it was possible for the plaintiff 'to decide which system suited him best, and to resort to one or other jurisdiction'.¹⁰² However the General Law Amendment Act put an end to the anomaly.

9.4.9. THE COLONIAL COURTS OF ADMIRALTY ACT OF 1890

The Colonial Courts of Admiralty Act,¹⁰³ which came into operation on 1 July 1891, swept away the Cape of Good Hope Vice-Admiralty Court. It created a Colonial Court of

99. Act No.8 of 1879.

100.R.W. Lee, What has become of the Roman-Dutch Law?, South African Law Journal, vol.47, 1930, p.278.

101.Act No.8 of 1879, section 1.

102.Lee, loc.cit.

103.53 & 54 V., c. 27.

Admiralty in every British Possession as part of the ordinary judicial system. The Act provided for the establishment of Colonial Courts of Admiralty and for their jurisdiction in the following terms;¹⁰⁴

'(1) Every court of law in a British Possession, which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty.

(2) The jurisdiction of a Colonial Court of Admiralty shall...be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.'

The Cape Supreme Court was never expressly declared to be a Court of Admiralty. However it automatically became a Court of Admiralty in 1891 by virtue of the fact that it exercised 'original unlimited jurisdiction' as envisaged in section 2(1) of the Act. It is also clear that the jurisdiction of the Cape Colonial Admiralty Court was derived from and equivalent to that of the High Court of Admiralty in England.¹⁰⁵ Furthermore when sitting as a

104. Section 2.

105. Section 2(2).

Colonial Admiralty Court, the judges of the Cape Supreme Court were obliged to apply English Admiralty Law.¹⁰⁶ Finally it appears that the jurisdiction and practice of the Colonial Admiralty Courts were 'frozen and Limited' to that of the High Court of Admiralty in England as in 1890.¹⁰⁷

9.5. THE LEGAL PRACTITIONERS ACT OF 1892

The Legal Practitioners Act,¹⁰⁸ which was promulgated on 2 September 1892, provided for the admission of practitioners from the neighbouring States on a reciprocal basis. Advocates of Natal, the South African Republic and the Orange Free State, who had passed an examination in law equivalent to the Cape LL.B. degree, could apply for admission to practise before the Cape Supreme Court.¹⁰⁹

After admission to the Cape Bar, those practitioners, who enjoyed the right of dual practice, were required to practise solely as advocates. Similar provision was made for the admission of attorneys.¹¹⁰ The recognition of 'foreign' examinations in law was, however, subject to reciprocal rights of admission being granted to Cape advocates and attorneys.¹¹¹

9.6. THE NATIVE TERRITORIES APPEAL ACT OF 1894

Although the Barry Commission's recommendation that African customary law should be recognized as a system of uncodified

^{106.} Crooks & Co. v. Agricultural Cooperative Union Ltd 1922 AD 423.

^{107.} C.Dillon and J.P.van Niekerk, South African Maritime Law and Marine Insurance : Selected Topics, Durban : Butterworth, 1983, p.18.

^{108.} Act No.30 of 1892.

^{109.} Section 1.

^{110.} Section 2.

^{111.} Section 5.

law in the Transkeian territories was rejected by the government, the magistrates continued to apply it. However when cases went on appeal to the Supreme Court, the judges refused to recognize the validity of the system, and the circuit court judges had 'already struck down a number of magisterial decisions in lobolo cases when in December 1893 the Supreme Court ruled that African customary marriages were illicit unions'.¹¹² In the case of Nggobela v. Sihele¹¹³ the Chief Justice stated that;

'Provision is made by Act No.16 of 1860 for the appointment of marriage officers for solemnizing the marriage of persons professing the Mohamedan faith according to Mohamedan customs and usages, but no similar provision exists for marriages according to Native Customs and usages. The only mode in which a valid marriage can be contracted between Natives in this Colony is before a minister of religion, or a lay marriage officer, with previous publications of banns or notice, or failing these by special licence. A union, therefore, founded only upon Native customs and usages within the Colony proper is not a marriage, whatever rights may by special legislation (The Native Succession Act of 1864) have been given to the offspring of such a union in respect of the distribution of property left by their parents upon their death. In the absence of special legislation recognising such a union as a valid marriage, the courts of law are bound-however much they may regret it-to treat the intercourse, I will not say as immoral, but as illicit.'

According to Saunders;¹¹⁴

'The chief magistrates told the government that the "revolution" this judgment implied threatened the stability of the territories. A Bill was therefore introduced in 1894 providing that civil suits involving Africans East of the Kei were to go on appeal to a newly

112. Saunders, op.cit., p.128.

113. (1893) 10 S.C. 346.

114. Saunders, op.cit.

constituted "Native Territories Appeal Court", composed of one Chief Magistrate and two assessors.'

The Bill entered the Statute book as the Native Territories Appeal Act.¹¹⁵ In addition to setting up a Native Territories Appeal Court, the Act provided that appeals in which 'Europeans' were affected were to lie, as before, to either the Supreme Court, the Eastern Districts Court, or to a circuit court held within the territories.¹¹⁶

On 6 January 1899 the Native Territories Appeal Amendment Act¹¹⁷ was promulgated. The Act provided that;¹¹⁸

'An appeal shall lie from the judgment, decree or order, whether in first instance or on appeal of the Chief Magistrate of any of the territories...to the Supreme Court of this Colony in any civil suit, action or proceeding in which one of the parties thereto is a European.'

According to the wording of the Act, where either or both parties to a civil suit were white, and where the matter had been determined by the Chief Magistrate either in the first instance or on appeal presumably from the magistrates' courts of the territories, a right of further appeal lay only to the Supreme Court. Although the 1894 Act had stipulated that appeals from the courts of the resident magistrates had to be taken to either the Supreme Court, the Eastern Districts Court, or to a circuit court, it would appear that under the 1898 Act it was possible for the parties, if either or both were white, to bring an appeal against the judgment of a resident magistrate to the Chief Magistrate.

115. Act No.26 of 1894.

116. Section 2.

117. Act No.32 of 1898.

118. Section 1.

9.7. THE ANNEXATION OF BRITISH BECHUANALAND

On 11 November 1895 the Cape Parliament passed an Act¹¹⁹ which provided for the annexation of the territory known as British Bechuanaland. The Act abolished the Court of the Chief Magistrate, and the High Court of Griqualand was given concurrent jurisdiction with that of the Supreme Court 'in and over all causes arising and persons residing and being within all the districts comprising the...Territory'.¹²⁰ The rights, powers and functions of the Crown Prosecutor of Griqualand were extended to the territory, and the law relating to juries was put into force in the several districts. Suits pending in the Chief Magistrate's Court were removed to the High Court of Griqualand, and appeals from the resident magistrate's courts had to be made either to the High Court or to the Supreme Court, or to any circuit court within the territory.¹²¹

9.8. THE BETTER ADMINISTRATION OF JUSTICE ACT OF 1896

On 31 July 1896 the Cape Parliament passed an Act¹²² to consolidate and amend the law relating to the administration of justice. The fundamental structure of the three superior courts was reaffirmed. However the Act¹²³ regulating the pensions of the judges was repealed, and the following section was inserted in the consolidating Act;¹²⁴

119. Act No.41 of 1895.

120. Section 8.

121. Section 11(b).

122. Act No.35 of 1896.

123. Act No.2 of 1867.

124. Section 9 of Act No.35 of 1896.

'Any person having served the office of Judge of the Supreme Court for the full period of ten years shall be entitled to retire from the said office and to receive a pension to be ascertained as follows : that is to say, if he shall have served such office for a period of ten years or upwards, he shall be entitled to a pension equal to one-half of the salary which shall have been paid to him for the three years immediately preceding his retirement; and if he shall have served for a period of fifteen years or upwards, then to a pension equal to two-thirds of such salary aforesaid : Provided, always, that no such pension shall be paid to any Judge retiring before he shall have attained the age of sixty years, unless he shall be afflicted with some permanent infirmity disabling him from the due execution of his office; and provided, further, that in case any person serving the office of Judge shall, before he shall have served for such full period of ten years, happen to be afflicted with any permanent infirmity disabling him from the due execution of his office he shall be entitled to receive such pension as the Governor for the time being shall in the circumstances consider to be reasonable, such pension not exceeding one-half of the salary which shall have been payable to him at the time at which he shall have ceased to be able to discharge the duties of his office.'

9.8.1. APPEAL UNDER THE MATABELELAND ORDER IN COUNCIL
OF 1894

The Better Administration of Justice Act of 1896 authorized the Supreme Court to sit as a Court of Appeal for the purpose of hearing appeals from the High Court of Matabeleland, as provided for under the Matabeleland Order of Council of 18 July 1894.¹²⁵ Civil matters could be brought on appeal to the Supreme Court when the amount in dispute

¹²⁵. Section 44 of Act No.35 of 1896.

exceeded £100. Further appeal lay to the Judicial Committee of the Privy Council. The Supreme Court was also given jurisdiction to determine all cases stated for its opinion by the High Court when the amount in dispute exceeded £100.¹²⁶ The Supreme Court had to determine all matters brought before it on appeal from, or stated for its opinion by, the High Court in accordance with the law which the High Court might lawfully apply to the decision and determination of such matter.¹²⁷

The Matabeleland Order in Council had provided that the Cape Law was to be applied 'as nearly as the circumstances of the country permit'.¹²⁸ In the case of Salisbury Reef Gold Mining Company v. B.S.A. Co.¹²⁹ which was taken on appeal to the Supreme Court, the Chief Justice held that 'the circumstances did not permit of jury trials in civil cases'. According to Palley, High Court trials were conducted by the judge sitting with three assessors.¹³⁰

9.9. THE SUPREME COURT EXTENDED APPELLATE JURISDICTION ACT OF 1898

On 20 October 1898 the Matabeleland Order in Council was superseded by the Southern Rhodesia Order in Council. It was therefore necessary to amend the provisions of Act No. 35 of 1896 which dealt with appeals from the High Court of Matabeleland, in order to provide for appeals from the High Court of Southern Rhodesia. At the same time it was

126. Section 45.

127. Section 47.

128. Section 26 of the Matabeleland Order in Council.

129. (1898) 8 C.T.R. 443 at 446.

130. Palley, op.cit., p.152.

decided to further regulate appeals from the consular courts. Accordingly on 23 December 1898 the Supreme Court Extended Appellate Jurisdiction Act¹³¹ was promulgated so as to provide for appeals from the Courts constituted under the Africa Order in Council of 1889 and the Southern Rhodesia Order in Council of 1898.

The provisions of Act No.35 of 1896 relating to appeals under the Africa Order in Council and under the Matabeleland Order in Council were repealed,¹³² and the following provisions were inserted.

9.9.1. APPEAL UNDER THE AFRICA ORDER IN COUNCIL OF 1889¹³³

The Supreme Court was given jurisdiction to hear and determine;¹³⁴

'All appeals in matters brought before it from, and all cases stated for its opinion by, any Court in respect of which the said Supreme Court has been or may hereafter be prescribed as a Court of Appeal in (the) manner provided in and by Her Majesty's Order in Council made on the fifteenth day of October, 1889, and known as the "Africa Order in Council, 1889" : Provided that an appeal from an order of such Supreme Court on appeal shall lie to Her Majesty in Council in the same manner and on the same conditions as appeals from the judgments of the said Supreme Court in its ordinary jurisdiction.'

When sitting as a Court of Appeal under the Africa Order in Council, the Supreme Court had to determine all matters brought before it;¹³⁵

131. Act No.22 of 1898.

132. Section 1.

133. See also 9.3.

134. Section 2.

135. Section 6.

'In accordance with the law which the Court from which such matter is brought either in appeal or upon a case stated in writing may, by the aforesaid Order in Council, or by any other Order, law, or rule binding upon the said Court, lawfully apply to the decision and determination of such matter.'

9.9.2. APPEAL UNDER THE SOUTHERN RHODESIA ORDER IN COUNCIL OF 1898

The Supreme Court was given jurisdiction to hear, entertain and determine;¹³⁶

'In (the) manner provided by Her Majesty's Order in Council made on the twentieth day of October, 1898, and known as "The Southern Rhodesia Order in Council, 1898", appeals in civil matters brought before it from the High Court of Southern Rhodesia when the amount or value in dispute exceeds one hundred pounds sterling, provided that an appeal from an order of such Supreme Court on appeal shall lie to Her Majesty in Council in the same manner and on the same conditions as appeals from the judgments of the said Supreme Court in its ordinary jurisdiction.'

The Supreme Court was also given jurisdiction to determine cases stated for its opinion by the High Court when the amount in dispute exceeded £100, and in cases in which a judge of the High Court had granted leave to appeal, even when the matter in dispute was less than £100.¹³⁷

The Supreme Court was authorized to prescribe the procedure for bringing the appeals; provided, however, that no rule made by the Supreme Court was to be repugnant to or inconsistent with any article, provision or rule contained

136. Section 7.

137. Section 8.

in, or made under, the provisions of the Order in Council.¹³⁸

The Supreme Court had to determine all matters brought before it on appeal from, or stated for its opinion by, the High Court in accordance with the law which the High Court might lawfully apply to the decision and determination of such matter.¹³⁹

The Supreme Court was given jurisdiction to entertain, hear and determine criminal appeals from the High Court; which could be brought by a defendant on the grounds that the proceedings of the Court before which the trial took place were irregular or illegal.¹⁴⁰ The Supreme Court was also given jurisdiction;¹⁴¹

'To hear and determine all questions of law arising on the trial of any person for any indictable crime or offence in the said High Court or arising upon review of the judgment or sentence of any inferior court in any criminal action or suit by or before the said High Court, and reserved by the said High Court for the consideration and determination of the said Supreme Court, in (the) manner and subject to the conditions provided for in the said Order in Council.'

Finally the Supreme Court was authorized to hear and determine on appeal, any criminal case which had been brought on appeal or review before the High Court from any inferior court, and in which leave to appeal had been granted to either the prosecutor or the defendant by the High Court.¹⁴²

In any appeal against a conviction or judgment of the High

138. Section 9.

139. Section 10.

140. Section 11.

141. Section 12.

142. Section 13.

Court, or when any question of law was reserved, the Supreme Court could make the following orders;¹⁴³

- '(1) Confirm the judgment of the court below; or
- (2) Direct that the judgment shall be set aside, notwithstanding the verdict, which order shall have for all purposes the same effect as if the defendant had been acquitted; or
- (3) Direct that the judgment of the court shall be set aside, and instead thereof (direct) that such judgment shall be given by the court in which the trial took place as ought to have been given at the trial; or
- (4) If such court has not delivered judgment, remit the case to it in order that it may deliver judgment; or
- (5) Make such order as justice may require.'

However no conviction was to be set aside on the grounds of irregularity or illegality if the defendant was not prejudiced in his defence, or because evidence was improperly admitted or rejected by which no substantial wrong was, in the opinion of the Supreme Court, done to the defendant.¹⁴⁴

9.10. THE SPECIAL COURT FOR THE TRIAL OF PERSONS CHARGED WITH HIGH TREASON AND CRIMES OF A POLITICAL CHARACTER

The Special Court was set up in 1900 to try treason and other political crimes arising out of the Anglo-Boer War.¹⁴⁵ The Governor of the Cape of Good Hope was authorized to appoint three persons, who were to constitute a Special Court;¹⁴⁶

'For the purpose of trying all cases of High Treason and all cases of crimes of a political character,

143. Section 14.

144. Section 14.

145. Indemnity and Special Tribunals Act, No.6 of 1900.

146. Section 8.

committed before or within six months after the passing of (the Indemnity and Special Tribunals) Act.'

At least two of the members of the court had to be judges of the Supreme Court; and the third had to be either a judge or an advocate of the Supreme Court, the Eastern Districts Court or the High Court of Griqualand of not less than ten years' standing, who at the date of the passing of the Act, was duly practising as an advocate in the colony, and who was not a Member of either House of Parliament.¹⁴⁷

During the lifetime of the Special Court, the quorum of the Supreme Court, the Eastern Districts Court and the High Court of Griqualand was reduced to a single judge.¹⁴⁸

All cases of High Treason and of crimes of a political character, whether committed before or after the taking effect of the Indemnity and Special Tribunals Act, in which the Attorney-General had decided to indict, were to be tried by the Special Court, without a jury. In hearing and determining such cases, the court was vested with the same powers, jurisdiction and authority as the Supreme Court, or any single judge thereof;¹⁴⁹

'In the exercise of the ordinary criminal jurisdiction of such Court in hearing and determining criminal cases and proceedings in connection therewith, as well as with the functions of a jury, save that a verdict of the majority of the members shall suffice.'

The jurisdiction vested in the Special Court included all the powers, rights and privileges of the Supreme Court in the following matters;¹⁵⁰

147. Section 9.

148. Section 10.

149. Section 13.

150. Section 14.

- '(a) The enforcing the attendance of witnesses and examining them on oath;
- (b) The compelling the production of documents;
- (c) The compelling the disclosure and production in evidence of telegraphic or cable messages; and
- (d) The punishing the persons guilty of contempt.'

The court was authorized to pass any sentence upon any person convicted by it, which a judge of the Supreme Court might have passed had such person been convicted after trial before him and a jury; and every sentence passed by the Special Court was to have the same effect in every respect, and was to be carried out in the same manner, as if it had been a sentence passed by a judge of the Supreme Court.¹⁵¹ The court was authorized to sit in any district of the colony, provided that two weeks' notice had been given in the Government Gazette and in a newspaper circulating within the district.¹⁵² The court was required to apply the law administered by the Supreme Court, save in so far as it was expressly varied by the Indemnity and Special Tribunals Act.¹⁵³ A right of appeal lay to the Supreme Court at the instance of any convicted person;¹⁵⁴

'From any decision, whether depending on questions of law or of fact, which had been arrived at not unanimously but by a majority only of the said Special Court.'

The court had to hold its sittings in public; and the practice, form and manner of procedure, and rules of evidence had to be in accordance with the laws and rules regulating the practice, form and manner of procedure, and rules of evidence in criminal trials in the Supreme Court.¹⁵⁵

The Attorney-General had to prosecute all trials before

151. Section 15.

152. Section 17.

153. Section 18.

154. loc.cit.

155. Section 19.

the Special Court, either in person or by any person qualified to prosecute in criminal cases before the Supreme Court. The accused were entitled to be represented by an advocate, attorney or law agent.¹⁵⁶

Any member of the Special Court, sitting in Chambers, was entitled to exercise the jurisdiction of the court in all matters except;¹⁵⁷

'Trial, the making of rules or regulations, and such matters as (might) by rule be reserved for the decision of the full court; but the judgment or order of any member of such court in Chambers (was) subject to appeal to the full court.'

During the lifetime of the Special Court, no other court within the colony was to exercise jurisdiction in any matter within the jurisdiction of the Special Court, save as to appeals brought before the Supreme Court.¹⁵⁸

The Special Court was authorized to make rules, orders and regulations touching upon the following matters;¹⁵⁹

- '(a) The carrying into effect, fully and completely, the provisions of the Indemnity and Special Tribunals Act.
- (b) The times and places of holding sittings of the said court.
- (c) The manner of recording or noting evidence and the proceedings of the said court.
- (d) The duties and proceedings of the registrar and other officers of the court.
- (e) The fees and charges to be lawfully demanded by, and to be payable to, the sheriff, registrar or other officers of the court, and the persons practising therein.

156. Section 23.

157. Section 25.

158. Section 26.

159. Section 29.

- (f) All such other matters as may be necessary or advisable for the proper conduct of the business of the court.'

Finally the court was constituted as a court of record,¹⁶⁰ and provision was made for the records to be transmitted to the registrar of the Supreme Court on its dissolution.¹⁶¹

9.11. THE BETTER ADMINISTRATION OF JUSTICE ACT OF 1904

On 31 May 1904 an Act¹⁶² was promulgated to further amend the law for the better administration of justice. Divisional Courts consisting of single judges were established, subject to the following :¹⁶³

- (1) No more than two Divisional Courts were allowed to sit at the same time for the dispatch of civil business.
- (2) Appeals were to lie from the Divisional Courts to the Supreme Court sitting as a Court of Appeal.
- (3) The Governor was authorized to assign one or more puisne judges to the Supreme Court for the purpose of forming part of the Appeal Court.

Section 13 of the Charter of Justice was amended so as to allow the judges to accept and perform any office or duty permitted or directed to be performed by a judge under any Act of Parliament.¹⁶⁴

The Attorney-General was authorized to direct the sheriff or his deputies to:¹⁶⁵

'Draw and summon, in the manner required by law, twenty-seven qualified persons to serve as jurors during any session for the trial of criminal cases in the Supreme Court, or the Eastern Districts Court, High Court of Griqualand, or in any circuit court, ... in addition to the number provided for by the thirty-fourth section of the "Jury Act, 1891", and the laws applying to jurors summoned under the said Act (were to) apply to the jurors summoned under this Act.'

160. Section 30.

161. Section 31.

162. Act No.35 of 1904.

163. Section 2.

164. Section 3.

165. Section 4.

The Special Court which had been set up in 1900 to try treason and other political offences, and the Special Court for the trial of Mining Offences, were abolished.¹⁶⁶ From 1 July 1904 the law relating to trial by jury was to apply to the prosecution of offences under the laws relating to the diamond trade.¹⁶⁷

The Act further amended the Native Territories Penal Code, and provided that all criminal cases, which had previously gone on review to the Chief Magistrate, had to be forwarded to the superior courts of the colony.¹⁶⁸ Furthermore all appeals in, and all applications or other judicial proceedings arising out of, criminal or civil cases heard in the courts of the resident magistrates had to be taken to the superior courts.¹⁶⁹

9.12. THE BETTER ADMINISTRATION OF JUSTICE ACT OF 1905

On 16 May 1905 an Act¹⁷⁰ was promulgated to further amend the law for the better administration of justice. The Divisional Courts were given jurisdiction to hear and determine appeals from the resident magistrates' courts.¹⁷¹ The Act also provided that in cases of appeal from the judgment of a Divisional Court, the judge in question was to be disqualified from sitting as a member of the Appeal Court.¹⁷² Furthermore the law applying to appeals from the superior courts to the Supreme Court was made applicable to appeals from any Divisional Court to the Supreme

166. Section 6 and 8.

167. Section 8.

168. Section 9.

169. loc.cit.

170. Act No.9 of 1905.

171. Section 2.

172. Section 3.

Court sitting as a Court of Appeal.¹⁷³

9.13. THE BETTER ADMINISTRATION OF JUSTICE AND REMISSION OF TREASON PENALTIES ACT OF 1906.

The Better Administration of Justice and Remission of Treason Penalties Act¹⁷⁴ increased the number of Divisional Courts which could sit at the same time from two to three.¹⁷⁵ Furthermore the section¹⁷⁶ which permitted the judges to accept and perform any office or duty permitted or directed to be performed by a judge under any Act of Parliament, was repealed.¹⁷⁷ The High Court of Griqualand was reduced to a single judge court,¹⁷⁸ and the law relating to the powers vested in certain cases in a single judge were made applicable to the High Court.¹⁷⁹ Finally provision was made for the Judge President of the High Court to retire on pension after 1 July 1907.¹⁸⁰

9.14. THE SUPREME COURT OF SOUTH AFRICA

When the union of Southern African States was achieved in 1909,¹⁸¹ a single Supreme Court of South Africa was established 'with an Appellate Division at its apex, and provincial and local divisions at its foundation'.¹⁸² The Appellate Division of the Supreme Court was to consist of the Chief Justice of South Africa, two ordinary judges of appeal, and two additional judges of appeal.¹⁸³ The additional judges of appeal were to be assigned to the

173. Section 4.

174. Act No.29 of 1906.

175. Section 1.

176. Section 3 of Act No.35 of 1904.

177. Section 2 of Act No.29 of 1906.

178. To take effect on 1 July 1907.

179. Section 5.

180. Section 7.

181. South Africa Act 9 Edw.7, c.9.

182. Hugh Corder, Judges at Work : The Role and Attitudes of the South African Appellate Judiciary, 1910-50, Cape Town :

Juta, 1984, p.21.

183. Section 96 of the South Africa Act.

Appellate Division from any of the provincial or local divisions of the Supreme Court, but they were required to continue to perform their duties as judges of their respective divisions when their attendance was not required in the Appellate Division.¹⁸⁴

With the establishment of the Union on 31 May 1910, the Supreme Courts of the Cape of Good Hope, Natal, the Transvaal, and the High Court of the Orange River Colony became provincial divisions of the Supreme Court of South Africa.¹⁸⁵ The Eastern Districts Court, the High Court of Griqualand, the High Court of Witwatersrand, and the circuit courts became local divisions of the Supreme Court within the respective areas of their jurisdiction as existing at the establishment of the Union.¹⁸⁶

The provincial and local divisions retained their original jurisdiction, and in addition they were given jurisdiction in all matters;¹⁸⁷

'(a) in which the Government of the Union or a person suing or being sued on behalf of such Government is a party; and

(b) in which the validity of any provincial ordinance shall come into question.'

All the judges of the Supreme Courts of the colonies, holding office at the establishment of the Union, became judges of the Supreme Court of South Africa,¹⁸⁸ and the Chief Justices of the colonies became Judge Presidents in the respective provinces.

184. loc.cit.

185. Section 98(1).

186. Section 98(2).

187. Section 98(3).

188. Section 99.

9.15. ON AND OFF THE BENCH

The Chief Justice continued to dominate the Supreme Court Bench until his elevation to the Chief Justiceship of the Union of South Africa in 1910. At the Cape he reigned supreme until 1904,¹⁸⁹ when, after the institution of single judge Divisional Courts, it became possible for the full Bench to sit on appeal from his judgment. However;¹⁹⁰

'Only once did he suffer at the hands of his colleagues who being human, did not conceal a certain mild enjoyment in doing for him what he had done for some of them.'

Four of his judgments were upset by the Judicial Committee of the Privy Council,¹⁹¹ and he bore these unaccustomed reversals hardly'.¹⁹² When his judgments in the Hiddingh estate cases were reversed by the Judicial Committee, he defended himself in open court.¹⁹³ In the Asbestos Company case he announced that 'this court will never be able to find fraud in any case if there was none in the Orange River Asbestos Company case'.¹⁹⁴ When his judgment was upset in the case of Rex v. Van Reenen and others, he made the following comments;¹⁹⁵

'It is right that I should take an early opportunity of removing some misapprehension regarding the action of this court in the matter. Unfortunately the respondent was not represented by counsel in the appeal and consequently their Lordships seem not to have been informed of the actual nature of the proceedings with which this court had to deal... The papers laid before this court were the usual documents sent to the reviewing judge... It must have escaped their Lordship's notice that the application which was granted

189. Act No.35 of 1904.

190. Walker, op.cit., p.86; citing Soeker v. Colonial Government (1907) 17 C.T. R. 1143; upset on appeal, 18 C.T.R. 43.

191. Hiddingh v. S.A. Association 2 S.C. 414; Hiddingh v. S.A. Association 3 S.C. 424; Trustees of Asbestos Co. v. Hirsche and others 10 S.C. 71; R. v. Van Reenen and others 19 S.C. 332.

192. Walker, op.cit., p.87.

193. 6 S.C. 238.

194. Walker, op.cit.

195. 12 C.T.R. 1056.

was to set aside the proceedings of the magistrate's court and not of a martial law court... The Privy Council...regarding the documents, so far as they represent the trial to have taken place before the magistrate, as waste paper and practically non-existent, deemed it unnecessary to interfere with the proceedings at all. Fortunately, as far as the respondent is concerned, the practical effect of the two points of view is exactly the same for, after the remarks of the learned Lord Chancellor, it will be impossible hereafter to charge the respondent with having been convicted by a court of this colony.'

In 1879,¹⁹⁶ and again in 1895,¹⁹⁷ de Villiers demonstrated his absolute and fearless impartiality and respect for the liberty of the subject regardless of the political consequences. In the Sigcau case, he stated;¹⁹⁸

'The court has been warned that the release of the petitioner might possibly endanger the peace of the country. A similar warning was addressed to the court in 1879... In giving judgment I ventured to make the following remarks : "It is said the country is in such an unsettled state, and the applicants are reported to be of such a dangerous character, that the court ought not to exercise a power which, under ordinary circumstances, might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the court... The civil courts have but one duty to perform, and that is to administer the laws of the country without fear, favour, or prejudice, independently of the consequences which may ensure".'

When federation of the South African States and Colonies was being considered in 1877, de Villiers drew up a scheme for the organization of a Supreme Court and a Court of Appeal; the main features of which were that the Supreme Court would consist of all the judges of the Supreme Courts

196. In re Kok and Balie (1879) 9 Buch. 45.

197. R. v. Sigcau (1895) 12 S.C. 283.

198. loc.cit.

of the different Provinces and that for the purpose of a general Court of Appeal, the judicial strength of the different Provinces would be utilized as far as possible.¹⁹⁹ In essence, the scheme was that which was adopted by the National Convention of 1908. However he was not content to work merely for a federal court in Southern Africa, and he 'urged on a species of Imperial federation by the inclusion of Colonial judges in the Privy Council'.²⁰⁰ The opportunity for raising the issue of admission to the Privy Council presented itself in 1886, when Chief Justice Burford-Hanock of Gibraltar asked him to join with the other Colonial judges in a memorandum to H.M. Government protesting against the recent award of precedence, which placed British County Court judges in front of Colonial judges.²⁰¹ De Villiers eagerly promised his support, and at once raised the question to the 'plane of high Imperial politics'.²⁰² In a letter dated 1 August 1886 de Villiers raised the issue of the Judicial Committee as a link of Empire;²⁰³

'There can be little sincerity in the desire generally avowed in England to draw closer the ties which join the Mother Country and the Colonies... A practical step in that direction would be taken if some of the disabilities under which Colonial judges labour...were removed. For example, Chief Justices of the different Supreme Courts of India are, if I am not mistaken, eligible for appointments as members of the Judicial Committee of the Privy Council, whereas no such privilege extends to the Colonial Chief Justices whose judicial duties are in many instances equally important and laborious.'

199. Walker, op.cit., p.110; citing a letter dated February 1877.

200. Walker, op.cit., p.116.

201. Walker, op.cit., p.117.

202. Walker, op.cit.

203. Walker, op.cit.

However nothing came of the proposal until 1895 when the Rosebery Ministry passed the necessary Bill. On 7 July 1897 de Villiers took the oath of a Privy Councillor and joined the Judicial Committee as the first Colonial Chief Justice to be appointed under the scheme. Further honours were bestowed on de Villiers in 1910, when he was appointed Chief Justice of the Union of South Africa and was created a Baron in appreciation of his work as President of the National Convention. In parting with Lord de Villiers, it is fitting to quote the following remarks made by Sir James Rose Innes in the Appeal Court on 15 September 1914;²⁰⁴

'The roll of South African judges contains the names of many eminent men - the memory of Menzies and Watermeyer, of Cloete and Connor, to mention no others, can never perish from amongst us. But the name of de Villiers towers above them all; it occupies and will continue to occupy a place of its own. For his position among South African judges was, and is, and will remain unique. To this many factors contributed; his intellectual quality, his force of character and his length of service; his keen and logical mind, his grasp of legal principle and his remarkable capacity for going to the root of a tangled matter; for distinguishing between essentials and unessentials - these were in themselves sufficient to ensure judicial eminence. And in addition he possessed in a rare degree the gift of lucid and precise exposition. He was a man of firm decision and will; no matter how long the case, his mind never reached saturation point; however definite a view he might hold at any particular stage of the hearing, he was always ready to entertain and to weigh fresh argument. ... He was the foremost of the band of judicial workers...who,

204. B.A.Tindall, James Rose Innes : Chief Justice of South Africa, 1914-27, Cape Town : OUP, 1949, p.328-329.

taking the magnificent body of jurisprudence bequeathed to us by the lawyers of Holland, adapted and applied its living principles to the changing and complicated conditions of modern society, with the result that in years to come the doctrines laid down by that wonderful school of jurists will regulate the affairs of a country far larger in extent and in population than the little land by the Northern Sea from which they sprang.

Lord de Villiers' contribution to this great work is embodied in a series of decisions which are never likely to be equalled in number by those of any other judge and whose lucidity in exposition of the law will lighten the labours of South African courts and guide the footsteps of South African lawyers in future times.'

During the twilight years, de Villiers witnessed many changes on the Cape Town, Grahamstown and Kimberley Benches. Judge Dwyer, who occupied the senior puisne judgeship at Cape Town, resigned shortly before his death on 29 July 1887. It appears that Dwyer who was never considered to be a great lawyer, 'rather overrated his own abilities'.²⁰⁵ However there can be no doubt that he was a hard-working and conscientious judge. He proved to be somewhat of a martinet and the slightest slackness in the inferior courts caused an explosion. In R. v. Williams²⁰⁶ he commented strongly on 'the system of hieroglyphics practised on the record'.²⁰⁷ He was highly critical of the magisterial bench and such sweeping dicta as 'some of the magistrates seem scarcely to make themselves acquainted with the law' were not infrequent.²⁰⁸ His outbursts evoked the following comment in the press;²⁰⁹

'I beg, with many apologies for being so rude, to remind Mr. Justice Dwyer that those who live in glass

205. Alfred Whaley Cole, Reminiscences of my life and of the Cape Bench and Bar, Cape Town : Juta, 1896, p.58.

206. Review from magistrate of Bathurst, 5 June 1869.

207. F.St.Leger, The Honourable Mr. Justice Edward Dwyer, South African Law Journal, vol.51, 1934, p.162.

208. St.Leger, loc.cit., p.163.

209. Eastern Province Herald, dated 5 March 1873.

houses should not throw stones. Our 'superior' courts are hardly in a position to asperse the superiority of others. Of late years every important decision of the Supreme Court - the Long judgment, the Standard Bank case, the Peterson case, etc., - has been reversed by the Privy Council, and an elaborate judgment of the Eastern Districts Court, occupying several columns of small print - Stewart v. Benjamin (1871) 2 Roscoe 61 - has just been unanimously reversed by the Supreme Court on appeal.

Under these circumstances Mr. Justice Dwyer might cultivate the neglected virtue of modesty.'

In 1871 the Somerset and Bedford Courant, after reporting the undignified incidents at the local circuit court, proceeded to lecture Judge Dwyer in the following manner;²¹⁰

'Calm dignity adds more to the dignity of a judge and tends to inspire the audience with more respect than fussing and fidgetting about in hedgehog fashion, with quills up ready to prick everything round about, in which his Lordship's temper unfortunately leads him. Calm dignity is a token of a well-balanced mind, whereas the utterance of improper and cutting remarks at an improper season not only detracts from the importance of the judge but brings the court actually into contempt... The ginger pop fashion may be court dignity of a certain type; but our people are too sedate to appreciate such new-fangled notions. Neither can they understand the bubbling effervescence that goes with a pop and means nothing.'

In 1875 the Mercury reached the high water mark of unseemly comment when dealing with Judge Dwyer's mode of conducting the circuit at King William's Town, where;²¹¹

'He "became at the same time prisoner, witness, prosecutor, judge and jury", for after emphasising the fact that "browbeating is a very poor substitute for patient judicial investigation, it descended to vulgar abuse when dealing with the scarlet gown and horse-hair wig "which can be ascribed to the custom of covering those parts of the body which are in any way deficient".'

210. Somerset and Bedford Courant, dated 14 October 1871.

211. St.Leger, loc.cit., p.65.

Time never mellowed his temperament and his conduct of the Franks murder trial in 1884 was severely criticized.²¹² His altercations with the Crown Prosecutor are described as 'regrettable...while in pleasing contrast is the good fellowship he maintained with the jury upon whom he exercised some hilarious influence'.²¹³ According to St.Leger;²¹⁴

'Off the Bench Dwyer was of a most kind and generous disposition and was loved by all who came in contact with him. An ardent devotee of all forms of sport and social enjoyment, he was a familiar figure in Cape society and foremost in all social duties. His company was much sought after and intercourse with him greatly enlivened by his Irish humour and inexhaustible fund of anecdotes - by nature he was most hospitable and his hospitality was apparently particularly enjoyable as he knew and kept good food and wine.'

On 1 August 1887 the legal profession assembled in the Supreme Court to pay tribute to his memory and the Chief Justice, in the course of his address, said;²¹⁵

'As to his earnest desire to do justice between man and man no one can entertain any doubt. He had his failings - which of us has not? - but even these failings bore the stamp of the kindly nature he had; a hatred of wrong and oppression of every kind, while he sought above all things to avoid the conviction and punishment of the innocent.'

On Dwyer's retirement Judge Smith was appointed senior puisne, and Judge E.J.Buchanan was transferred from Grahamstown to fill the vacancy. Judge Smith, who was the last judge to be appointed directly by the British Government, retired on 12 April 1892 after a period of twenty-three years' service. He took an active part in organizing and

212. Cape Law Journal, vol.1, 1884, p.157.

213. loc.cit.

214. St.Leger, loc.cit., p.66.

215. St.Leger, loc.cit., p.67.

maintaining libraries, hospitals, schools and other institutions. He has been described as the 'father of rifle associations in South Africa'.²¹⁶ In 1889 he became Vice-Chancellor of the University of the Cape of Good Hope, and Chancellor in 1898. The esteem in which he was held, and the regret at his resignation, was shown in the speeches made by the Chief Justice and the Attorney-General on the occasion of his retirement. The Chief Justice said that 'not a whisper has ever been heard affecting his integrity, his independence, and all those high qualities which are required of an honest and upright judge'.²¹⁷ He had been called upon to act as Chief Justice and President of the Legislative Council in 1888, 1889 and 1890.²¹⁸ His career as a judge 'was distinguished by the most unassuming amiability, firmness, patience and tact, and he commanded the unreserved good-will and affection of the whole profession'.²¹⁹

Ebenezer John Buchanan was admitted to the Cape Bar on 15 May 1873. He quickly acquired a busy practice and in 1879 he was appointed acting Attorney-General of Griqualand West. He refused the offer of a permanent appointment, and also the recordership, and returned to Cape Town. At the same time he rejected the Attorney-Generalship of the Transvaal, but accepted a temporary appointment on the Grahamstown Bench in 1880. The appointment became a permanent one on 27 July 1881, and he remained at Grahamstown until 23 June 1887 when he was transferred to Cape Town.

216. A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.376.

217. The Late Charles Thomas Smith, South African Law Journal, vol.18, 1901, p.231.

218. loc.cit., p.230.

219. Roberts, op.cit., p.376.

During his stay at Grahamstown he edited the first five volumes of the Eastern District Court reports. Besides these, he edited several volumes of the Supreme Court reports, and gave permanence to the decisions of the short-lived Court of Appeal. On the retirement of Judge Smith in 1892, he became senior puisne judge and on several occasions he acted as Chief Justice and President of the Legislative Council.²²⁰ He was appointed president of the Special Court, appointed under the Indemnity and Special Tribunals Act,²²¹ from 1902 to 1903. He was a prominent Free Mason, on the Library Committee and the University Council. He was knighted in 1901 and was awarded the honorary degree of LL.D. by the University of Cambridge and by the University of South Africa. After Union he often acted as Judge President of the Cape Provincial Division of the Supreme Court and retired on 7 January 1920. According to Cole, he was 'a clear-headed well-read lawyer and one of the most amiable of men';²²² but he was not a profound lawyer.

When Judge Smith retired on 12 April 1892 Judge Buchanan was appointed senior puisne judge, and Thomas Upington was appointed second puisne. Upington, who was called to the Irish Bar in 1867, came to the Cape in 1874 for health reasons. He was admitted to the Cape Bar on 12 October 1874 and soon secured a leading practice at the Bar and in politics. Upington was appointed Attorney-General on 6 February 1878 and he remained in office until the fall

220. In 1894, 1897, 1900 and 1905.

221. Act No.6 of 1900.

222. Cole, op.cit., p.128.

of the Sprigg Ministry in 1881. When the Scanlan Ministry fell in 1884 Upington was called upon to form a Ministry. As Prime Minister from 1884 to 1886, he retained the portfolio of Attorney-General. He relinquished the Prime Ministership in 1886, but continued as Attorney-General until the fall of the government in 1890. In 1887 he proceeded to the Colonial Conference in London, where he was knighted for his services. However his health was far from satisfactory and in 1892, on the retirement of Judge Smith, the Rhodes Ministry offered him a seat on the Cape Bench. In January 1896 the Rhodes Ministry fell and Sir Thomas, after four years of 'monotonous dignity', resigned his judgeship and once again became Attorney-General.²²³ He held the portfolio until April 1898, when his health compelled his resignation. He died on 10 December 1898. According to St.Leger;²²⁴

'The few years that Sir Thomas spent on the Bench, were somewhat marred by indifferent health, but he occupied his seat with distinction and is said to have made a good judge. Doubtless after many years in the political and social life at the Cape, it was too late for his heart to warm to the aloofness of judicial office and it is not surprising that when the call came he longed to return to the "old sport of Cabinet making".'

Roberts, however, points out that 'he never once differed from the rest of the court upon any question of law'.²²⁵

When Upinton resigned in 1896, Christian George Maasdorp was transferred from Grahamstown to fill the vacancy. Maasdorp was admitted to the Cape Bar on 3 August 1871,

223. F.St.Leger, *The Honourable Sir Thomas Upington*, *South African Law Journal*, vol.53, 1936, p.4.

224. St.Leger, *loc.cit.*, p.5.

225. Roberts, *op.cit.*, p.380.

and commenced practice in Griqualand West. Thereafter he practised at the Bar of the Eastern Districts Court until 1877, when he was appointed Attorney-General of the Transvaal. In February 1880 he resigned this position and returned to practise at Cape Town. On 12 April 1882 he was nominated by the Transvaal Government as Eerste Strafrechter, but refused the appointment.²²⁶ In 1885 he was appointed to the Bench, and on 1 November he joined Sir Jacob Barry and Judge Buchanan at Grahamstown. In 1896 he was transferred to Cape Town. At Union he became Judge President of the Cape Provincial Division of the Supreme Court and was appointed a Judge of Appeal. He retired on 30 June 1922. As a judge he was described as 'lucid and logical, courteous and patient'.²²⁷

At Grahamstown Sir Jacob Barry continued to occupy the office of Judge President until 1 August 1901 when he retired on pension. Sir Jacob's main characteristic, whether on the Bench or off it, was an 'untiring activity, physical and intellectual'.²²⁸ During his years on circuit, he went through and apparently enjoyed an amount of work which would have been too great a strain for many a younger man. Sittings until eight o'clock, 'till ten o'clock and even till one in the morning' were not unprecedented events on the Eastern circuit.²²⁹ Early or late Sir Jacob's attention never flagged in court, 'and he was equally impervious to the efforts of the long and difficult travelling' whilst on the Transkeian circuit.²³⁰ Off the Bench he took a great

226. Roberts, op.cit., p.370.

227. Roberts, op.cit.

228. Sir Jacob D.Barry, Cape Law Journal, vol.17, 1900, p.217.

229. loc.cit.

230. loc.cit.

interest in all educational matters. He was also Chairman of the Commission on Native Laws and Customs in 1881. He was a 'strong judge with a marked individuality',²³¹ and Cole referred to him as 'one of the most hard-working conscientious judges' that he had known.²³²

When Judge Buchanan was transferred to Cape Town in 1887, the vacancy at Grahamstown was filled by Judge Twentymen Jones. Judge Jones succeeded Barry as Judge President of the Eastern Districts Court on the latter's retirement in 1901. He resigned on 5 July 1904 and died in 1913.²³³ He took a lively interest in matters appertaining to legal and general education, and often acted as an examiner in law of the Cape of Good Hope University. He also founded the Villagers Football Club.²³⁴ In the infamous case of R. v. Hart²³⁵ which was held at East London, he pronounced the verdict of the jury to be a disgrace to the community and declined to thank the jurors for their services.

When Judge Maasdorp was transferred from Grahamstown to Cape Town in 1896, William Henry Solomon was appointed to fill the vacancy. Judge Solomon, who had been admitted to the Cape Bar on 12 April 1878, moved to Kimberley where he was appointed Circuit Prosecutor on 1 October 1883.²³⁶ He was appointed first puisne judge at Kimberley on 1 July 1887. In March 1896 Solomon was transferred to the Eastern Districts Court, where he sat as puisne judge

231. Roberts, op.cit., p.348.

232. Cole, op.cit., p.128.

233. Roberts, op.cit., p.366.

234. The Hon. S.Twentymen Jones, South African Law Journal, vol.20, 1903, p.343.

235. (1894) 9 E.D.C. 138.

236. The designation of the office was subsequently altered to that of Assistant Law Adviser to the Crown.

nominally until 28 March 1902. He was president of the Special Court, appointed under the Indemnity and Special Tribunals Act,²³⁷ from 30 October 1900 until his appointment to the Transvaal Bench on 29 March 1902. On 9 June 1910 he was made a judge of appeal, and he became Chief Justice on 1 March 1927. According to Roberts, Judge Solomon was 'one of the greatest judges South Africa has known'.²³⁸ He possessed 'the judicial temperament of the highest order... Besides integrity and learning, he had depth, and balance, and patience, and caution, and courage, and, above all, wisdom'.²³⁹

On 1 July 1902 John Devonshire Sheil was elevated to the Eastern Districts Court Bench. After commencing practice at Cape Town towards the end of 1889, he was appointed Assistant Legal Adviser to the Crown in 1896. This position involved, in addition to the duties of Parliamentary draftsman and of general adviser to the administration, the deputising for the Attorney-General in the criminal work in the courts.²⁴⁰ In 1900 his health failed and he was obliged to take long leave. After some months' rest he returned to his work in time to assist in the re-organization of the Law Department. He retired from the Bench on 25 July 1913 and died at Muizenberg on 26 March 1935.²⁴¹ According to St.Leger;²⁴²

'As a judge, he was held in high regard by all. Though never regarded as a profound lawyer, he was always considered a sound one and had a most useful attribute in a thorough knowledge of case law. His long experience as a prosecutor equipped him well

237. Act No.6 of 1900.

238. Roberts, op.cit., p.377.

239. Roberts, op.cit., quoting Chief Justice J.de Villiers.

240. F.St.Leger, *The Honourable Mr.Justice J.D.Sheil*, South African Law Journal, vol.54, 1937, p.144.

241. Roberts, op.cit., p.375.

242. St.Leger, loc.cit., p.145.

for his duties in criminal work and his persistent determination to arrive at the root of every matter before him made him singularly fitted for judicial office.'

In 1891 he brought out the first volume of the Shiel's Reports which were printed and published by the Cape Times. The reports, which became known as the Cape Times Law Reports, were continued until Union. Until his elevation to the Bench, Shiel personally prepared and edited the yearly volumes.

John Gilbert Kotzé was appointed to the Bench of the Eastern Districts Court in 1903. On 8 July 1904 he succeeded Twentyman Jones as Judge President. Kotzé commenced practice in Cape Town on 18 August 1874, but in June 1876 he moved to Grahamstown. He was appointed to the Bench of the Transvaal High Court in 1877, and on 8 August 1881 he became Chief Justice of the South African Republic. On the retrocession of the Transvaal in August 1881, he was appointed one of the Imperial Sub-commission to investigate and compensate claims for losses and injuries sustained during the war.²⁴³ However dissatisfaction with the attitude of President Kruger led him to accept the first puisne judgeship of the High Court of Griqualand. On returning from the Cape Colony to settle his affairs, he was indited to withdraw his resignation as Chief Justice. In 1897 he was again involved in a serious difference of opinion with the President as a result of the judgment in Brown v. Leyds N.O.²⁴⁴ De Villiers attempted to mediate in the dispute, 'but in 1898 the storm burst with renewed violence and on

243. The Hon. J. G. Kotzé, South African Law Journal, vol. 20, 1903, p. 103.

244. (1897) 4 Off. Rep. 17.

5 February Kotzé was "dismissed" by the President'.²⁴⁵ After visiting England, Kotzé returned to the Transvaal where he commenced practice at the Bar. However after nine months he left the Transvaal in 1899. In 1900 he was appointed Attorney-General of Southern Rhodesia. In 1903 he was appointed to the Bench of the Eastern Districts Court, where he remained as Judge President until 1913. He then took up an appointment as puisne judge at Cape Town, becoming Judge President there on 14 June 1920. He was appointed to the Appellate Division on 16 June 1922, and retired in 1927. In 1896 he received the Knight Grand Cross of the Portuguese Order of the Conception, and in February 1917 he was knighted. Sir John made an important contribution to the development of Roman Dutch Law in South Africa. According to Hiemstra;²⁴⁶

'His particularly wide knowledge enabled him to apply the law correctly where others would have turned to English sources more readily accessible. His dedication to his work is made obvious in the relations he maintained with Dutch jurists.'

With Friedrich Jeppe as co-editor, Kotzé published De locale wetten der Zuid-Afrikaansche Republiek, 1849-1885. The second volume, for 1886-87, was edited by Kotzé alone. He also reported four volumes of the Transvaal judgments. He wrote a series of articles in the South African Law Journal dealing with the History of Roman Dutch Law, as well as a lengthy article on Judicial Precedent.²⁴⁷ He also translated Simon van Leeuwen's Het Roomsche-Hollands Recht into English. He was responsible for a number of other publications, which included his Biographical Memoirs and Reminiscences.

245. Roberts, op.cit., p.367.

246. V.G.Hiemstra, Johannes Gysbert Kotzé, in W.J.de Kok, Dictionary of South African Biography, Cape Town : Tafleberg, 1968, vol.1, p.440.

247. South African Law Journal, vol.34, 1934, p.280.

On 15 July 1904 Thomas Lyndoch Graham was appointed to the Bench of the Eastern Districts Court. However he was immediately detached for duty as Chairman of the Civil Service Commission, and it was not until 1906 that he actually took his seat on the Bench.²⁴⁸ He commenced practice at Cape Town on 28 April 1885 and rapidly established a reputation, particularly in jury trials. He had the leading criminal practice when he was appointed Attorney-General in 1898. The Sprigg Ministry resigned in October of the same year, but in 1900 he resumed office as Colonial Secretary. The Attorney-General, James Rose-Innes, resigned on 18 February 1902 and Graham again took over the Attorney-Generalship. He acted as Prime Minister for a few months in 1902, and declined a portfolio in the Jameson Ministry which was formed in 1904. Soon after taking his seat on the Grahamstown Bench, he 'showed promise of becoming an eminent judge'.²⁴⁹ When Sir John Kotzé was transferred to the Cape Provincial Division in 1913, Graham was appointed Judge President of the Eastern Districts Local Division.

In 1887 the Griqualand High Court Bench consisted of James Buchanan the Judge President, and Judges Twentyman Jones and Laurence. On 1 July Twentyman Jones was transferred to the Eastern Districts Court, and Buchanan resigned on account of ill-health in September. Judge P.M. Laurence was appointed acting Judge President; and William Solomon and Alfred Whaley Cole were elevated to the Kimberley Bench. As a judge, Buchanan 'had been a tower of strength'.²⁵⁰

248. F.G.S. Sir Thomas Lyndoch Graham, South African Law Journal, vol.40, 1923, p.2.

249. loc.cit.

250. F.St.Leger, The Hon. Mr. Justice James Buchanan, South African Law Journal, vol.50, 1933, p.141.

He was one of the few lawyers to receive his entire education in the Cape Colony. He was a brilliant law student at a time when local law reports and textbooks did not exist and translations of the authorities were unknown. According to St.Leger, 'he belonged to that band of pioneer judges who did so much to elucidate the Roman-Dutch Law and lay the foundations of our Common Law'.²⁵¹ Apart from his judgments, he made many important contributions to legal literature. While at the Bar, he edited the Menzies Reports and wrote the prefatory remarks on provisional sentence in volume one. He was the author of the Supreme Court Reports from 1868 to 1870, and joint editor of the first two volumes of the Appeal Court Reports. In 1878 he brought out a book on Precedents in Pleading, and in 1879 he published Buchanan on Insolvency. He also translated the first three books of Voet, which were published in 1880, 1881 and 1883, respectively. He was a 'studious and cultured man of great literary attainment, possessing a flowing pen, indomitable courage and a natural aptitude for verse'.²⁵² At Kimberley he assisted in founding and improving the public library, and he contributed frequently to the South African Press in prose and verse. After his retirement, he sailed to England and died in London on 10 December 1893.

P.M.Laurence was admitted to the Cape Bar on 29 November 1880. He moved to Kimberley in 1881, and after practising for over a year, was appointed to the Bench on 7 September 1882. In July 1887 he was appointed to act as Judge Pres-

251. St.Leger, loc.cit., p.142.

252. St.Leger, loc.cit.

ident, and received the permanent appointment on 16 March 1888. From 1905 to 1907 he was Chairman of the War Losses Inquiry Commission, and he also served as a judge at Cape Town. When the High Court of Griqualand was reduced to a single judge court on 1 July 1907, the Act²⁵³ made special provision for his retirement.²⁵⁴ He was acting ordinary Judge of Appeal in 1911, and acting Judge President of the Natal Provincial Division in 1912. In 1913 he retired to England, where he died on 28 February 1930. He compiled the Griqualand High Court Reports from 1882 to 1889, and constructed a separate index and digest for these years. He was joint editor of the volume covering the period 1895-98, and edited the reports from 1899 to 1904. He was considered to be a competent judge, but he is not remembered for any great judgments. According to Cole;²⁵⁵

'His judgments are profound and elaborate - perhaps a little too elaborate sometimes - and are greatly respected by the profession for the learning and research they display.'

Several of his essays, addresses and reviews were reprinted in Collectanea, which was published in London in 1899. In 1903 he published a second collection of his articles under the title On Circuit in Kafirland and other Sketches and Studies. His last literary work was The Life of John Xavier Merriman. He displayed a keen interest in education and was examiner in both Classics and Mathematics for the University of the Cape of Good Hope. However he will always be remembered as a pioneer of the public library

253. Act No.29 of 1906.

254. Section 7.

255. Cole, op.cit., p.130.

in South Africa. He was Chairman of the Committee of the Kimberley Public Library from 1883 to 1900, and he compiled a Catalogue of the Kimberley Public Library, which was published in 1891. He was created a Knight Bachelor in 1908 and K.C.M.G. in 1911.

In March 1888 Alfred Whaley Cole was appointed to the Bench of the High Court of Griqualand. He was admitted to the Cape Bar on 26 July 1856 and rapidly established himself as one of the leaders. He was elected to the House of Assembly for the Cape Division in 1864, but resigned the following year. Three years later he was again returned for Albert. In 1868 he acted as Attorney-General, and later in the year he was offered an acting judgeship. He accepted the offer and was assigned to the Grahamstown Bench. On the Bench 'he was most successful, his patience, dignity and courtesy being appreciated by all, and on the appointment of Judge Smith in the following year, there was universal regret at his departure'.²⁵⁶ From 1875 to 1877 he represented Colesburg as a Member of the House of Assembly. When the High Court of Griqualand was created a three judge court in 1882, Cole was offered the Judge Presidency, but he declined the honour. However he agreed to act as a puisne judge until Twentyman Jones was appointed. Once again he acquitted himself well on the Bench, and in 1885 he was appointed acting judge at Grahams-town. When Buchanan's health broke down in 1887, a vacancy again occurred in the Griqualand High Court. However

256. F.St.Leger, The Honourable Mr. Justice Alfred Whaley Cole, South African Law Journal, vol.52, 1935, p.5.

Cole had become extremely deaf and could only hear with the assistance of tubes.²⁵⁷ The Attorney-General, after personally testing his ability to hear proceedings, offered Cole a puisne judgeship at Kimberley. Cole accepted the appointment and took his seat on the Bench in March 1888. Unfortunately his hearing grew worse and his sight began to fail, so that by 1890 there was considerable discussion on his ability to carry on his duties.²⁵⁸ In the following year it was reported that 'the Government had "arranged" with Mr. Justice Cole²⁵⁹ and on 14 September 1891 he resigned'.²⁶⁰ He retired on pension to Wynberg, where he died on 26 November 1896. On his death, he was described as a 'unit in the brilliant constellation of men of letters and learning of the halcyon days of Cape History'.²⁶¹ As an advocate 'he was superb,²⁶² and as a lawyer he was a great admirer of the Roman Dutch Law. In 1864 he had been appointed Colonial Law Lecturer and Professor. The former position he held for many years, 'though the latter he resigned almost immediately owing to a misunderstanding which had arisen'.²⁶³ According to St. Leger;²⁶⁴

'On the Bench he always had the reputation of being most fairminded and courteous, though towards the end he was considerably hampered by his lack of hearing.'

Judge Cole was also a classical scholar and his knowledge of English literature was profound. Together with Professor Noble, he founded and edited the Cape Monthly Magazine from 1857 to 1861. For a time he also edited the South African Magazine. He contributed frequently to the

257. St. Leger, loc.cit., p.6.

258. St. Leger, loc.cit.

259. Cape Law Journal, vol.8, 1891, p.180.

260. St. Leger, loc.cit.

261. Cape Times, dated 27 November 1896.

262. St. Leger, loc.cit.

263. St. Leger, loc.cit., p.7.

264. St. Leger, loc.cit.

South African Press and submitted many leading articles. After his retirement he wrote his reminiscences under the title Reminiscences of my life and of the Cape Bench and Bar.

The vacancy caused as a result of Judge Cole's resignation was filled by William Musgrove Hopley on 18 March 1892. Hopley was admitted to the Cape Bar on 12 April 1878. He practised at Cape Town for a few months before moving to Grahamstown, where he remained until August 1883. He then established himself at Kimberley. On 2 July 1885 he was appointed acting Crown Prosecutor, in the place of Leigh Hoskyns, and acted until the end of the year. In 1886 the appointment was made permanent. He retained the post until he was appointed to the Bench in March 1892. From 1904 he was mainly on duty in the Supreme Court, and in 1906 he was permanently assigned there. On 1 October 1914 he was appointed to the Southern Rhodesia Bench. He died in harness on 10 March 1919 while on a visit to Johannesburg. According to Kitchin;²⁶⁵

'As a circuit judge his advent was always welcomed by the members of the Bar and by the leading citizens of the towns which he visited, as he was and is famed for his hospitality and geniality. He frequently contrived to combine a shooting expedition or a few rounds of golf with the arduous task of endeavouring to find in court the laying of the beacons of some particular farm of which different accounts were given by a cloud of the oldest inhabitants.'

When Judge Solomon was transferred to the Eastern Districts

265. S.B.Kitchin, The Hon. William Musgrove Hopley, South African Law Journal, vol.31, 1914, p.248.

Court in 1896, Johannes Henricus Lange was appointed to fill the vacancy on the Kimberley Bench. Lange commenced practice in Kimberley on 1 December 1877. From 1879 to 1880 he held the office of Parliamentary Draughtsman and Clerk to the Legislative Council of Griqualand West.²⁶⁶ From 1888 to 1892 he represented the Kimberley division in the House of Assembly, during which period he also acted as Government Whip to the Rhodes Ministry. In 1892 he resigned his seat in order to take up an appointment as Crown Prosecutor. On 15 February 1896 he was appointed to the Kimberley Bench. He was a member of the Special Court appointed under the Indemnity and Special Tribunals Act.²⁶⁷ When the High Court of Griqualand was reduced to a single judge court in 1907, Judge Lange's services were retained at Kimberley. From 1905 to 1907 he had acted as Judge President. In 1915 he acted as President of the Special Court for Treason Trials, and was subsequently appointed Chairman of the Commission of Inquiry into the causes of the rebellion. In 1914 he had been appointed sole Commissioner to inquire into the charges of bribery against the Chairman and certain members of the Transvaal Provincial Council. In recognition of his public services he was knighted in 1917. He played a prominent part in the public affairs of Kimberley and was extremely fond of shooting and golf. He was still in office when he died at Muizenberg on 5 January 1923.

266. Sir John Lange, South African Law Journal, vol.37, 1920, p.396.

267. Act No.6 of 1900.

ANNEXURE II

Table of Cases taken on Appeal to the Judicial Committee of the Privy Council during the period 1880 - 1909*

1. Asbestos Co., Trustees of v. Hirsche and others 6 H.C.G. 260; upset on appeal, 10 S.C. 71; decision of Appeal Court upset by Privy Council, 64 L.J.P.C. 1.
2. Attorney-General v. Van Reenen 19 S.C. 332; upset by Privy Council, 20 S.C. 667.
3. Caledon Landing, Shipping and Salvage Co. Ltd, and another v. East London Harbour Board (1906) 23 S.C. 540; upheld on appeal to Privy Council, 18 C.T.R. 1103.
4. Colonial Government v. Hepworth & Son 11 S.C. 288; upset on appeal to Privy Council, 12 S.C. 111.
5. Cook Bros. v. Colonial Government 12 S.C. 86; upheld by Privy Council on appeal, 16 S.C. 578.
6. De Beers Consolidated Mines v. Kimberley Waterworks Co. 7 H.C.G. 163; upset by Appeal Court, 12 S.C. 52; on appeal to the Privy Council the judgment of the Appeal Court on the first action was affirmed, but the judgment on the second action reversed, 14 S.C. 262.
7. De Beers Consolidated Mines v. London and S.A. Exploration Co. 7 H.C.G. 39; upset on appeal, 10 S.C. 359; judgment of Appeal Court upheld by Privy Council, 12 S.C. 107.
8. De Jager v. De Jager Buch. 1 A.C. 429; upheld by Privy Council. Buch. 2 A.C. 146.
9. Eastern and South African Telegraph Co. v. Cape Town Tramways Co. 17 S.C. 95; upheld in substance on appeal to the Privy Council, 11 C.T.R. 589.
10. Hiddingh v. South African Association 2 S.C. 414; upset on appeal by Privy Council, 5 S.C. 298; commented on by De Villiers, C.J., 6 S.C. 238.
11. Hills v. Colonial Government 20 S.C. 107 and 416; upheld on appeal to Privy Council save as to slight variation on claim in reconvention, (1906) Buch. 2 A.C.
12. Horne v. Struben (reported as Struben v. Colonial Government) 17 S.C. 242; upheld on appeal to the Privy Council, 19 S.C. 317.

*The Table has been compiled from cases reported in Murray Bisset and P.F.Smith, The Digest of South African Case Law, Cape Town : Juta. 1909, vol.3.

13. Houlder Bros. v. Colonial Government (1906) 23 S.C. 97; on appeal varied as to claim in convention, Buch. 3 A.C. 29; judgment of Appeal Court upset and original judgment restored by Privy Council, Buch. 3 A.C. 266.
 14. Joseph v. Mulder's Estate 18 S.C. 193; upheld by Privy Council on appeal, 20 S.C. 144.
 15. Logan v. Colonial Government 18 S.C. 125; upheld by Privy Council on different reasoning, 20 S.C. 343.
 16. R. v. Sigcau 12 S.C. 256; upheld by Privy Council on appeal, 13 S.C. 504.
 17. R. Van Reenen and others 19 S.C. 332; upset on appeal to Privy Council, 20 S.C. 667; judgment of Privy Council commented on by De Villiers, C.J., 12 C.T.R. 1056.
 18. South African Breweries v. Hodgson 12 C.T.R. 465; upset by Privy Council on appeal, 21 S.C. 281.
 19. South African Breweries v. Martienssen 12 C.T.R. 465; upset by Privy Council on appeal, 21 S.C. 281.
 20. Torva Exploration Syndicate v. Kelly 15 S.C. 131; upheld on appeal to Privy Council, 17 S.C. 301.
 21. Torva Exploration Syndicate v. Lamb 15 S.C. 131; upheld on appeal to Privy Council, 17 S.C. 301.
 22. Torva Exploration Syndicate v. Meeks 15 S.C. 131; upheld on appeal to Privy Council, 17 S.C. 301.
 23. Treasurer-General v. Lippert 1 S.C. 291; upset by Privy Council on appeal, 2 S.C. 172.
 24. Vilander Concession Syndicate v. Colonial Government 22 S.C. 110; upheld on appeal, Buch. 2 A.C. 221; further upheld by Privy Council, Buch. 3 A.C. 49.
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CHAPTER TEN

10. CONCLUSION

10.1. EVENTS LEADING UP TO THE CREATION OF THE CAPE SUPREME COURT, 1795-1826

Events leading up to the creation of the Cape Supreme Court commenced soon after the First British Occupation in 1797. Although the British authorities considered the prevailing system of justice to be defective, they were not prepared to introduce any drastic or immediate alterations. They opted, instead, for a policy of gradual anglicization of the legal institutions at the Cape. Prior to the Cape being formally ceded to Britain in 1814, three important changes were made to the legal institutions. In 1807 and in 1808 Courts of Appeal for Civil and Criminal Cases were established. In 1811 a system of circuit courts was introduced, and in 1813 the court proceedings were opened to the public. The innovations introduced principles of English law and jurisprudence and paved the way for the more extensive changes which were to follow.

In 1819 a new form of criminal procedure was introduced by the Crown Trials proclamation. Although the framers of the proclamation had intended to assimilate the procedure to that of England, they approached their task gingerly and based the proclamation on the old form of

practice in accordance with the policy of gradual change. The influx of British settlers in 1820 added impetus to the policy of anglicization and the authorities were moved to adopt a more decisive approach towards the legal system. The stage was accordingly set for the next innovation which was directed at introducing the English language in all official and judicial business. The decision to introduce English in the courts focussed attention on the need to reform the Court of Justice. The Under-Secretary for Colonies seized upon the idea of using the court as the instrument for promoting anglicization. According to this plan there would be no necessity to 'suddenly or forcibly' interfere with the prevailing laws and the colonial expenditure would be kept to a minimum. Although the autocratic Governor of the Cape, Lord Charles Somerset, felt that the time was not ripe for implementing the proposed reform of the Court of Justice, the die had already been cast and the stage moved to the House of Commons in London. On 25 July 1822 Mr. Wilmot Horton rose in the House and played his part by moving for the appointment of a Commission to inquire into the state of affairs at the Cape of Good Hope. The Commissioners were issued with special instructions to investigate the legal system. These instructions can be attributed to the policy of anglicization which, in turn, had given rise to the idea that the best manner of ruling the colony would be through the importation of the English legal system. However the Colonial Office was opposed to

a 'sudden and forceful' implementation of this policy and attention was accordingly focussed on the courts. It was decided to reform the superior court structure and to use the courts as the instruments for effecting the policy.

The recommendations contained in the report of the Commission of Inquiry provided a practical basis for implementing the policy of anglicization. The Commissioners had sealed the fate of the Court of Justice by drawing attention to the manifest defects which they had unearthed in its structure and operation. In its place they recommended the establishment of courts based on the English models. Although the authorities were not prepared to accept all of the recommendations, they seized upon the underlying principles and many of the recommendations were incorporated in the Charter of Justice, which created the Supreme Court. Some of the recommendations were only implemented at a later stage. Others were either rejected out of hand or raised in the Inquiries of 1845 and 1875. The Commission's greatest impact, however, lay in its underlying purpose which permeated into the future development of the Cape Supreme Court.

10.2. THE BIRTH OF THE CAPE SUPREME COURT

The year 1827 was destined to be a momentous one in the history of the judicial system at the Cape. The doors of the Court of Appeal and the Court of Justice were sealed

with the keys provided by the Commission of Inquiry, and the authorities were hard at work giving birth to a more illustrious successor which was to emerge as the Cape Supreme Court. The Colonial Office, armed with the recommendations contained in the report of the Commission of Inquiry, had finally decided to make a clean sweep of the existing courts, and the new institutions were based on the English models. The machinery necessary for establishing the new courts was incorporated in a Charter of Justice, which provided for a centralized Supreme Court for the whole colony, with its seat of jurisdiction at Cape Town. By rejecting the recommendations which made provision for the establishment of a separate court in the Eastern districts, the Colonial Office incurred the wrath of the inhabitants who resided there, and demands for an independent court became a major issue in the future development of the Cape Supreme Court.

On 10 December 1827 the stage was set on a new era when the Governor announced that the Cape Supreme Court would be opening on 1 January 1828. Reaction to the new court was generally favourable. The Charter of Justice was hailed as 'a bulwark of civil liberty'. However some reservations were expressed as to whether trial by jury would promote justice in a racially mixed community. These doubts were well-founded as subsequent events were to demonstrate.

With the birth of the Cape Supreme Court, the policy of anglicization took a giant leap forward. The Supreme Court had, in turn, simultaneously given birth to an unseen mechanism which was neither expressly spelt out in the Charter of Justice nor in the policy directives of the Colonial Office. This mechanism was to permeate into the reasoning behind the law and finally became established as one of the sources of the law itself. The silent mechanism, better known as judicial precedent, went largely unnoticed in the early years of the growth and development of the Cape Supreme Court, but today it loudly proclaims itself as one of the court's greatest legacies.

10.3. THE EXPERIMENTAL PERIOD

The experimental period, which commenced in 1828 and ended in 1834, highlighted the inflexibility of the Charter of Justice and was characterized by the strained relationship which developed between the Governor and the Chief Justice. This relationship, together with considerations of economy, made it necessary to amend the Charter of Justice. Although the Charter had separated the executive authority from that of the judiciary, the relationship still had to be clearly defined in practice. The Governor, who entertained certain misgivings over the new innovations, was determined to retain a firm control over the judiciary. The judges, however, were equally determined

to exert their independence and were not prepared to brook any interference from the Governor. The strained relationship, which was initially restricted to the Governor and the Chief Justice, spilled over and encompassed the legislature and the Bench.

The first serious clash, which occurred in the Council of Advice, resulted in the dismissal of the Chief Justice as a member of that body. The second clash arose out of the patronage over the officers of the court. The Chief Justice insisted on exercising his right to appoint and dismiss the minor officers of the court. The Governor was reluctant to defer to his authority in this respect, and in 1834 the Chief Justice was stripped of his patronage. The third dispute concerned the language abilities of the jurors. The Chief Justice and Judge Menzies insisted that the jurors had to understand English, and they refused to recognize that the local authorities could legislate on the issue. Finally the judges contested the Governor's authority to extend the jurisdiction of the Supreme Court beyond the colonial boundaries.

Under Sir Lowry Cole's administration the relationship between the Governor and the Chief Justice reached breaking point. Sir John Wylde's alleged unnatural conduct towards his daughter was subjected to a confidential inquiry. Although the evidence was inconclusive, it did not deter the Governor from recommending that the Chief Justice be

dismissed from office.

The relationship between the judges was also troubled. The Chief Justice believed that Judge Menzies had taken a hand in instigating the rumours concerning his relationship with his daughter. Judge Burton harboured a grudge against Judge Menzies, because the latter had been preferred as senior puisne. The judges were equally divided as to whether the jurors were required to understand English. When the issue came up before the full Bench, the Chief Justice and Judge Menzies only managed to secure a majority decision in favour of their view when Judge Keke-wich withdrew his opposition in accordance with the established practice at Westminster. Judge Burton refused to be bound by the decision and he continued to conduct his circuits without insisting that the jurors had to have an understanding of English. Furthermore it was not possible to implement the Second Charter of Justice until 1834 because the majority of the judges were of the opinion that it was first necessary to establish a Legislative Council. Judge Menzies differed from the view expressed by his colleagues. He was of the opinion that the term 'Legislative Council', which appeared in the Second Charter, could be interpreted so as to include the Council of Advice.

The period 1828 to 1834 was also a period of methodical change, and the judges were at the helm of the process. They had set up the Supreme and circuit courts and were

responsible for drafting the rules of procedure. They were called upon by the Governor to give advice on many diverse matters and were responsible for drafting the major Ordinances of the day. In addition, the Chief Justice was required to examine all the draft Ordinances in order to ensure that they were in accordance with the fundamental laws of the colony.

Many of the problems were resolved by the Second Charter of Justice. The Bench was reduced from four to three judges and the Chief Justice was required to take his turn of circuit duty. He was also relieved of his patronage over the minor officers of the court. In future any one of the judges could be called upon to certify whether the draft Ordinances contained any legal impediments. Although the Chief Justice had been reduced in status, the judges proved their mettle by tenaciously resisting all attempts to undermine their independence. At the same time they were hesitantly laying down the foundations of judicial precedent. At the outset the judges had adopted the practice of delivering the reasons for their judgments in open court and the press was free to report the proceedings. The hierarchy of the courts also provided limited scope for the development of a system of judicial precedent. The proceedings of the inferior courts were subject to review by the judges who could correct or set them aside. A right of appeal from the civil judgments of the circuit courts to the full Bench of the Supreme Court was available

in cases where the amount in dispute exceeded £100. Furthermore a right of appeal from the civil judgments of the Supreme Court to the Privy Council was available in civil cases where the amount in dispute exceeded £1000. This was extended by the Second Charter which reduced the amount which was appealable to £500.

A significant development took place in 1833 when the Judicial Committee of the Privy Council was established. Prior to the passing of the Act, the members of the Committee of the Privy Council, which heard appeals, were not required to possess any judicial qualifications. With the creation of a Judicial Committee composed of eminent lawyers, it was to be expected that the decisions of the Privy Council would take on a greater significance in the development of judicial precedent at the Cape.

An analysis of the Supreme Court records reveals that counsel began to rely on the precedents of the Court of Justice at the outset, and it was not long before they began to cite the decisions of the Supreme Court itself. The judges adopted a cautious approach when considering the previous decisions of the court and they soon began to expressly rely on them to justify their judgments. It is clear, however, that the individual judges did not initially consider themselves to be bound by the decisions of the full Bench. It must be pointed out that during this period the rules of precedent were still fairly

fluid in England. Furthermore the absence of published law reports at the Cape greatly hampered the process. It is perhaps apt to describe the experimental period in the history of the Supreme Court as the period of silent growth in the development of judicial precedent.

The Supreme Court emerged from the experimental period with a reduced Bench, an enlarged master's office, and a Chief Justice who was somewhat diminished in status and pocket. Judge Menzies, who had unwisely instigated the language qualification dispute, experienced the discomfort of having his judgment overruled by the Second Charter which made it clear that an understanding of English was not a requirement for appointment as a juror. Judge Burton, who had travelled to Holland to learn the Dutch language and to study the Roman Dutch Law, and who proved to be exceptionally hard working and was well thought of, was unceremoniously shipped off to New South Wales. Judge Kekewich, who had been elevated to the Bench as compensation for his removal from the Vice-Admiralty Court, remained very much in the background. After a somewhat hesitant start, the judges had apparently performed too well and the Bench was left to carry on without Burton. However they had turned out to be true 'lions under the throne', and they were not prepared to brook any interference from either the Governor or the Council of Advice. It remained to be seen how they would fare against the newly constituted Legislative Council.

10.4. EXTERNAL FACTORS AND THE EMERGENCE OF A CENTRALIZED SUPREME COURT AT CAPE TOWN

The period 1834 to 1846 was characterized by external rather than internal developments in the chronicle of the Cape Supreme Court. In 1836 the British Parliament passed the Cape of Good Hope Punishment Act which extended the jurisdiction of the Cape Courts beyond the colonial boundaries. It was therefore necessary to cross the border in order to deal with a quite extraordinary event which led to 'one of the most remarkable episodes in which a judge has been involved'. On 22 October 1842 Judge Menzies crossed the Orange river at Alleman's Drift and, purporting to act under the Cape of Good Hope Punishment Act, he proclaimed the area British territory. The next event of importance occurred in the Eastern districts of the colony. In 1836 the Eastern districts were placed under the administration of a Lieutenant-Governor, who questioned the rank and precedence which the judges enjoyed whilst conducting circuits in his domain. In 1842 a far more important event took place in Cape Town, when the Legislative Council decided to flex its muscles and proceeded to test its relationship with the judiciary. The judges misjudged the prevailing mood and decided to resist the authority of the Council. However, their ingeniously contrived arguments came to nought and the Legislative Council was empowered to amend the Charter of Justice, thereby subordinating the judiciary to the local

legislative authority.

Emboldened by their newly acquired powers, and spurred on by considerations of economy, the members of the Legislative Council set up a Committee of Inquiry to investigate the judicial establishment. The Committee decided, by the Chairman's casting vote, to emasculate the Supreme Court by breaking it up into a number of decentralized local courts. However the Secretary for Colonies was not prepared to allow the measure, and he directed that a centralized Supreme Court at Cape Town, with jurisdiction throughout the colony, had to be maintained. The directive was enforced until 1904, when Divisional Courts were established.

During the traumatic period when the fate of the Supreme Court was in the balance, events were taking place in the newly annexed District of Natal which enhanced and extended the influence of the court. In 1845 a District Court was established in Natal and Hendrik Cloete, a Cape advocate and member of the Legislative Council, was appointed to the Natal Bench. A right of appeal lay to the Supreme Court in civil matters, and criminal cases could be removed to Cape Town for the determination of points of law. Although Natal was separated from the Cape Colony in 1847, the Cape Supreme Court continued to hear appeals from Natal until 1853.

By antagonizing the Lieutenant-Governor of the Eastern districts and by refusing to kowtow to the Legislative Council, the judges had provoked the British authorities into subordinating the judiciary to the legislative power. They had accordingly been placed under the mace and could no longer be called 'lions under the throne'. However in wielding the mace, the members of the Legislative Council had overreached themselves when they attempted to break up the Supreme Court. The British authorities were still actively pursuing a policy of anglicization at the Cape and they were not prepared to abandon the main instrument for promoting change in the legal system.

It is also apparent that the judges were achieving uniformity in the decisions of the Supreme and circuit courts, and that judicial precedent was flourishing. This was confirmed by the Attorney-General in his defence of the Supreme Court before the Legislative Council. In his address, the Attorney-General referred to the success which had been achieved by the judges in correcting the conflicting decisions of the circuit courts which had occurred soon after the implementation of the Charter of Justice. He attributed this to the action of the Supreme Court, and to the extent to which discussion in Cape Town had established principles that were being recognized as precedents on circuit. Finally the decisions of the Supreme Court, and the early decisions of the Natal District Court,

provide substantial evidence that judicial precedent was being recognized and accepted as a source of law, both at the Cape and Natal. However it is also clear that the individual judges were not prepared to be bound by the decisions, if they considered them to be incorrect.

10.5. GROWING PAINS

During the period 1846 to 1865 the composition of the Supreme Court Bench underwent a number of important changes. Judge Menzies died in harness at Coleberg in 1850. William Musgrave, who had been appointed to the Bench in 1843, succeeded Menzies as senior puisne judge. Sydney Smith Bell was appointed second puisne in 1851. Judge Bell succeeded Musgrave as senior puisne on the latter's death in 1854, and John Watts Ebdon was appointed second puisne. In 1855 Sir John Wylde retired and Judge Ebdon was obliged to take sick leave. Egidius Benedictus Watermeyer was appointed to act in the place of Judge Ebdon, and Hendrik Cloete was recalled from Natal in order to fill the newly created post of third puisne. The Chief Justiceship remained vacant until 1857, when the post was filled by Judge Bell in an acting capacity. Ebdon was obliged to retire, Judge Cloete was appointed senior puisne and Watermeyer's appointment was confirmed. In 1858 Sir William Hodges was appointed Chief Justice and Judge Bell was obliged to step down as senior puisne.

Only two immediate changes were introduced as a result of the Inquiry into the judicial establishment. In future the rules of court had to be confirmed by an Ordinance of the Legislative Council, and the system of impressment for the transport of the circuit judges was terminated. The more important changes were only introduced after the colony received representative government in 1853. The judges were also destined to play both a direct and an indirect role in the achievement of representative government. By refusing to give evidence before the Robben Island Committee, they had exposed the weakness of the Legislative Council. During the crisis which arose out of the British government's attempt to settle convicts at the Cape, the Chief Justice advised the Governor that he could not constitutionally send the convict ship away. The advice was followed by the Governor, and it almost led to civil war. This, in turn, contributed towards the granting of representative government.

In the case of Letterstedt v. Morgan and others, which arose out of the anti-convict agitation, the unseemly conduct of the judges shattered public confidence in the Bench. However the judges played a more positive role in the constitutional development of the colony, when they were called upon to assist in formulating the draft constitution. In this respect Sir John Wylde was instrumental in promoting the principle of an elective Upper House. He was rewarded by being appointed President of the Legis-

lative Council in the new Parliament.

During the first sitting of the new Parliament trial by jury was extended to civil cases in the Supreme Court. However attempts to secure a separate court for the Eastern districts were unsuccessful. Instead, a substitute Bill, which made provision for the appointment of a third puisne judge was carried in 1855. Owing to financial considerations the appointment was only filled in 1858. In the same year the Supreme Court was given control over the admission of notaries and conveyancers, and it became possible for aspirant advocates to qualify locally. Finally in 1864 the Eastern Cape separatists succeeded in obtaining a superior court, which was established at Grahamstown in 1865.

Many of the unresolved problems which had been raised during the Inquiry into the judicial establishment in 1845 received attention. The borders of the colony were extended as a result of the Frontier wars, and this resulted in an even greater strain being placed on the already overburdened circuits. The judges were requested to submit plans for the resolution of the difficulties. However the Governor disregarded their advice, and he attempted to solve the problem by introducing an additional circuit in 1859. This proved to be unworkable and the half-yearly circuits were restored in 1860. The conduct of circuit court prosecutions was investigated and the office of

clerk of the peace was considered. Although the clerks of the peace were retained, circuit prosecutions began to be conducted by the advocates. The establishment of the Eastern Districts Court in 1865, and the improvement in circuit transportation, did much to relieve the overburdened circuits.

The sheriff's office and the method of serving the court process were also placed under the spotlight. In 1856 an action for damages was brought against the sheriff on the grounds of negligence. The court found for the plaintiff and the sheriff was suspended. His duties were entrusted to the master, and the two offices were combined. The judges approved the combination as a temporary measure, but were opposed to it as a permanent arrangement. In 1860 a Select Committee was set up to investigate the position. As a result the two offices were once again separated in 1861.

10.6. THE ESTABLISHMENT OF THE EASTERN DISTRICTS COURT OF THE CAPE OF GOOD HOPE

Events leading up to the establishment of the Eastern Districts Court went back to the report of the Commission of Inquiry of 1823. Commissioners Bigge and Colebrooke had recommended that the colony be divided into two distinct and separate provinces for both administrative and judicial purposes. However the Secretary for Colonies re-

jected the recommendation and opted, instead, for a centralized Supreme Court at Cape Town, with jurisdiction throughout the colony. This met with a great deal of opposition from the majority of English speaking inhabitants in the Eastern districts, and they began to agitate for a separate court as part of their overall strategy for an independent government.

An analysis of the evidence collected by the Committee of Inquiry of 1845 revealed that the majority of the Bench and the Bar were in favour of stationing a judge in the Eastern districts, but serious doubts were expressed as to the wisdom of reducing the Bench to two judges in order to do so.

During the period 1847 to 1853 demands for the establishment of a local court faded into the background and the Easterners concentrated, instead, on the subject of representative government. The Governor's support for a unitary form of government for the colony was a 'heavy blow' to the separatists, but they soon recovered and Eastern Province Resident Associations were formed in order to oppose the plan. When the Cape Constitutional Ordinance was finally approved by the Privy Council in 1853, the Secretary for Colonies informed the Governor that separation could still be effected if it was found to be within the interests of the colony. The Governor seized upon the opportunity which had been presented and,

in order to stifle opposition from the separatists, he recommended that a Lieutenant-Governor and Solicitor-General be appointed for the Eastern districts, and he suggested that one or two resident judges be stationed in the territory in order to improve the administration of justice. The Governor was convinced that these measures would ensure that 'the wants of the Eastern parts would be sufficiently provided for without the removal of the seat of government and legislature or division of the colony'. After the Secretary for Colonies had approved the recommendations, the Governor approached the judges on the feasibility of stationing one or two judges in the Eastern districts.

The judges were unanimous in agreeing to the necessity of appointing additional judges, and they felt that the most satisfactory solution would be to establish a distinct and separate court for the Eastern districts. However, before Parliament met for the first time in 1854, Sir John Wylde made a final attempt to evade the mace, when he advised the Governor that the authority to amend the Charter of Justice had reverted to the Crown. Although his efforts were in vain, they delayed the Governor's plan to establish a distinct and separate court in the Eastern districts. When the necessary Bill was introduced to Parliament during the 1855 session, it was defeated by twenty votes to ten. It was argued that the Bill, which made provision for a Court of the Eastern

Province, either went too far or not far enough, and many thought that a second court was undesirable. However a substitute Bill, which provided for the appointment of an additional judge, successfully passed through both Houses.

Notwithstanding the relief which had been afforded by the appointment of an additional judge, the problems encountered by the system of circuit courts persisted, and two further Bills were unsuccessfully introduced to Parliament before a satisfactory solution could be found. In 1863 Charles Pote unsuccessfully introduced a private members Bill which made provision for the establishment of local courts at Grahamstown and Graaff-Reinet. In 1864 the Governor introduced a Bill which provided for the establishment of a Supreme Court of the Eastern Districts of the Cape of Good Hope. The court was to be composed of a Chief Justice and two puisne judges, and was to have exclusive jurisdiction within the Eastern districts. Three of the four judges were opposed to the Governor's proposals which were embodied in the Bill, and when it was published in the Government Gazette, it aroused a great deal of opposition. When Parliament met for the first and only time at Grahamstown on 13 June 1864, the Governor announced that the government had decided to withdraw the Bill because of the opposition which had been mounted against it. A vote was taken and the Bill was withdrawn by a majority of two votes.

When Parliament reassembled in Cape Town, a new Bill was introduced which provided for the creation of a Court of the Eastern Districts of the Cape of Good Hope. The Supreme Court Bench was to be increased to five judges and two of them were to be assigned to the Eastern Districts Court. The court was to be sited at Grahamstown and one of the judges would be required to take the Eastern circuits. The Supreme Court retained concurrent jurisdiction in the Eastern districts and appeals were to lie from the Eastern Districts Court to the Supreme Court at Cape Town. The Bill was passed, and on 26 July 1864 it entered the Statute book as Act No.21 of 1864. However the subordinate nature of the court gave birth to a long-lived grievance;

'That the judges at Cape Town, of no higher status, sat in judgment on their brethren in the East, but themselves were subject to check only by the Privy Council.'

Although the Eastern Districts Court helped to ease the pressure which had made the circuits almost intolerable, it failed to satisfy the separatists. Their continued agitation for a third judge and an independent court of equal status to that of the Supreme Court prompted the Governor to set up a Commission of Inquiry in 1874. The Supreme Court had successfully weathered the period of growing pains and had emerged with a Bench of five judges. Nonetheless its greatest challenge still lay in the Eastern districts of the colony, where its newly created tributary was in danger of being cut off, and the future of

the 'grand fountain of the law' was by no means secure.

10.7. MATURITY

The period of maturity commenced on a happy note with the opening of the Eastern Districts Court in 1865. However it soon became evident that the court was merely a tributary and that the real power lay in the Supreme Court. Its own judgments and those of the circuit courts had to be taken on appeal to Cape Town, and when the two judges presided together there was always the possibility that they would disagree and that judgment would be denied. It was also discovered that the court did not possess the jurisdiction to review sentences imposed by the resident magistrates. However the latter omission was remedied by an Act of Parliament in October 1865.

Across the border in neighbouring British Kaffraria, a Supreme Court had been in existence since 1862. When the Kaffrarian territory was annexed to the Cape Colony in 1866, the Kaffrarian Supreme Court was absorbed by the Eastern Districts Court and a place had to be found for the Kaffrarian judge. However the government was not prepared to enlarge the Eastern Districts Bench. They therefore removed Judge Connor and replaced him with the Kaffrarian judge. This fuelled the discontent and the Easterners began to vigorously press their demands for a court equal in status to that of the Supreme Court. The

government refused to yield to the demands and attention was shifted towards the granting of responsible government.

After much difficulty the colony was granted responsible government in 1872, and the Attorney-General joined the Cabinet. The incumbent, Johan Hendrik de Villiers, was soon elevated to the Bench, and became the first colonial born Chief Justice to occupy the office since the establishment of the Supreme Court in 1828.

During the period of maturity the character and composition of the Bench changed completely. In 1865 Connor and Denijssen were appointed to the Supreme Court Bench, and were assigned to the Eastern Districts Court. Judge Cloete retired on pension in October 1865. Judge Fitzpatrick, the former Kaffrarian judge, was appointed to the Eastern Districts Bench in 1866, and Judge Connor was obliged to return to Natal. However when Judge Watermeyer died in 1867, Connor was recalled to Cape Town to act in his place. Sir William Hodges died in 1868 and Judge Bell was appointed Chief Justice. Connor returned to Natal and the vacancy was filled by Edward Dwyer. Judge Denijssen was transferred to Cape Town and advocate Cole was made acting judge at Grahamstown. In 1869 Judge Fitzpatrick joined Bell and Denijssen at Cape Town, and Judge Dwyer was assigned to the Eastern Districts Bench. Charles Thomas Smith was appointed a judge of the Supreme Court, and was assigned to the Grahamstown Bench. Sir Sydney Smith Bell

suffered a stroke in 1873 and Johan Hendrik de Villiers was appointed Chief Justice. Judge Denijssen retired in 1877 and his seat on the Supreme Court Bench was filled by Judge Dwyer. In 1878 the vacancy at Grahamstown was filled by Judge Barry, the former Recorder of Griqualand West.

The Civil Jury Trials Act was amended in 1874 and provision was made for juries to sit only when requested by either side. A far more important development took place in the same year when a Commission was appointed to consider the constitution of the courts and the general administration of justice in the colony. However the members of the Commission were unable to reach agreement over the future of the Eastern Districts Court. The majority were in favour of dismantling the court. They were vigorously opposed by the minority who recommended that the Bench be increased to three judges with jurisdiction equal to that of the Supreme Court. The only immediate outcome of the inquiry was an Act which allowed a single judge, during vacation, to hear civil matters. In the following year all restrictions to the right of appeal to the Supreme Court, arising out of criminal cases in the magistrates' courts, were lifted.

Significant developments also took place in the field of judicial precedent. Although Judge Watermeyer had compiled a volume of law reports in 1857, the first real

breakthrough occurred in 1870 when the Menzies Reports were published in three volumes. In 1871 the Judicial Committee of the Privy Council was enlarged, when provision was made for the appointment of four paid members. However they were superseded in 1876 by Lords of Appeal in Ordinary. Finally in 1877 the Chief Justice drew attention to the importance of the Supreme Court decisions when he stated that;

'The decisions of the Supreme Court of this colony are received with as much respect in the Courts of the Republics and, if I am not misinformed, in the Courts of Natal and Griqualand West, as the decisions of their own Courts.'

10.8. APPEALING YEARS

In 1879 the Eastern Districts Court Bench was enlarged to three judges and a Court of Appeal was established. The Appeal Court was composed of the Chief Justice, the two puisne judges at Cape Town, and the senior judge of the Eastern Districts Court who was given the title of Judge President. It was given jurisdiction to hear civil appeals from the Eastern Districts Court and the circuit courts. However appeals from the Supreme Court continued to go direct to the Judicial Committee of the Privy Council. In criminal cases the Court of Appeal was empowered to consider special entries of irregularity and reservation of points of law from the Supreme Court, as well as from the other courts. Thus although the Eastern Districts Court obtained a third judge, and despite the fact that it stood on equal terms with the Supreme

Court in criminal cases, it was still denied concurrent jurisdiction in civil cases. The blow which had been dealt to the Supreme Court must have been a galling experience for the Chief Justice. However the pill was somewhat sweetened, because in practice, the Appeal Court Bench was dominated by the Cape Town judges.

The establishment of the Court of Appeal was not the only event of importance to the administration of justice. In 1879 the full impact of racial prejudice was forcefully driven home during the circuit court sessions at Victoria West. White justice was seen at its worst when the jury refused to convict the perpetrators of the Koegas Massacres in the face of overwhelming evidence. The 'Koegas trial' had a sequel when the Attorney-General sued the proprietor and the editor of the Cape Argus for libel, on the grounds that they had falsely accused him of failing to remove the cases to Cape Town because of political pressure.

In 1880 Girqualand West was annexed to the Cape Colony, and the Supreme Court was given concurrent jurisdiction with the High Court in the newly acquired territory. The recorder became a judge of the Supreme Court and appeals lay to the Court of Appeal. In 1882 it became necessary to increase the number of judges at Kimberley and the structure of the courts was made uniform. The Supreme Court was enlarged to the Chief Justice and eight puisne

judges, and the Judge President of the High Court of Griqualand was given a seat on the Court of Appeal. Civil appeals from the Grahamstown and Kimberley courts in which only two judges concurred, or against a judgment of a circuit court, had to be heard by not less than three judges of the Court of Appeal; and every appeal against a unanimous judgment of the three judges at Grahamstown or Kimberley had to be heard by not less than four judges of appeal. Further appeal lay to the Judicial Committee of the Privy Council, which continued to hear appeals from the Supreme Court. The Administration of Justice Act of 1882 also extended the jurisdiction of the Eastern Districts Court. It gave the court concurrent jurisdiction with the Supreme Court in the districts of Humansdorp, Uitenhage, Jansenville, Aberdeen, Murraysburg, Richmond and Hope Town; and also in the Transkei and Griqualand East.

However the Court of Appeal received a mixed reception, and amidst great opposition, especially from the Eastern districts, it was abolished in 1886. The Supreme Court was vested with all the powers of the former Court of Appeal. Appeals from the Eastern Districts Court, the High Court of Griqualand and the circuit courts had to be heard by not less than three judges, one of whom had to be the Chief Justice. In cases of appeal against the unanimous judgment of the full Bench of the Grahamstown or Kimberley courts, the three appeal judges had to reach

an unanimous decision.

On 25 July 1884 provision was made to allow the use of the Dutch language in the courts of law and in the legal proceedings. Although the magistrates were obliged to allow the language to be used upon request, the judges were given a discretion to disallow any such request. On 18 June 1886 an important amendment was made to the law of criminal procedure and evidence which allowed an accused, and his or her spouse, to give evidence under oath in criminal trials.

The restructuring of the courts resulted in a number of new appointments being made to the Bench. Judge Fitzpatrick, who had been subjected to an inquiry in 1878, emerged victorious. However he decided to retire the following year and the vacancy at Cape Town was filled by Andries Stockenström. Judge Stockenström was of sickly disposition and he died within six months of his appointment. Judge Smith was transferred to Cape Town, where he joined the Chief Justice and Judge Dwyer. At Grahamstown, Judge Barry was joined by Simeon Jacobs, the former Attorney-General. However Judge Jacobs was obliged to retire soon after his appointment on account of ill health. He was replaced by Ebenezer John Buchanan. Sydney Shippard completed the compliment of judges at Grahamstown. When Judge Shippard resigned in 1885 the vacancy was filled by Christian George Maasdorp. When the Court of

Appeal was abolished in 1886, the Eastern Districts Court consisted of Sir Jacob Barry the Judge President, Judge Buchanan and Judge Maasdorp. When the Griqualand West High Court was established in 1871, Barry was appointed recorder. When he resigned in 1878 to take up an appointment on the Eastern Districts Court Bench, Sydney Shippard filled the recordership in an acting capacity.

Shippard followed Barry to the Grahamstown Bench and Jacobus Petrus de Wet filled the vacancy at Kimberley. Judge de Wet left the Kimberley Bench in July 1880 and the vacancy was filled by James Buchanan. When the High Court of Griqualand became a three judge court in 1882, Judge Buchanan was appointed Judge President; and Sydney Twentyman Jones and Percival Maitland Laurence were appointed to the Kimberley Bench.

During the appealing years judicial precedent was openly recognized as a source of law at the Cape. The decisions of the Cape Supreme Court, and those of the Court of Appeal, commanded great respect not only within the colony, but also in the courts of the neighbouring States. In practice, the Court of Appeal was really the Supreme Court sitting under another name, and although the Kimberley and Grahamstown courts were not, strictly speaking, bound by the decisions of the Supreme Court, the judges stood the risk of having their judgments overruled on appeal if they stepped out of line. It is therefore not surprising that the decisions of the Supreme Court held first place

as authorities at Kimberley and Grahamstown. The importance of judicial precedent was further evidenced by the rapid growth in the publication of law reports. The current reports began to be printed on a regular basis, and most of the early decisions of the Supreme Court had been published. Finally the Chief Justice began to lay down the principles of stare decisis, and this proved conclusively that judicial precedent had come of age.

10.9. TWILIGHT YEARS

Although the fundamental structure of the three superior courts remained unchanged until 1904, a number of important developments took place during the twilight years. The grand jury was abolished in 1885, and the laws governing trial by jury in both criminal and civil cases were amended and consolidated. In 1888 the British Foreign Office decided to rationalize its foreign jurisdiction by consolidating the Foreign Jurisdiction Act and by issuing a comprehensive Order in Council for Africa. The Supreme Court was given appellate jurisdiction over the consular courts North of the Zambesi in terms of the Africa Order. Another significant development occurred in 1891 when the Supreme Court took over the functions of the Vice-Admiralty Court. In 1892 the law relating to the admission of legal practitioners was amended so as to provide for the admission of practitioners from the neighbouring territories on a reciprocal basis.

Problems were also experienced in the Transkeian territories where the magistrates continued to recognize the African customary law. The Supreme Court refused to recognize the system and ruled that customary marriages were illicit unions. This almost led to a 'revolution' and the law was amended to provide for a Native Territories Appeal Court.

In 1895 the jurisdiction of the Supreme Court and the High Court of Griqualand was extended to the newly annexed territory of British Bechuanaland. In the previous year the Supreme Court was empowered to hear appeals from the Matabeleland High Court, and in 1896 the law relating to the administration of justice was consolidated and amended. In 1898 the appellate jurisdiction of the Supreme Court was further extended to enable it to hear appeals from the High Court of Southern Rhodesia.

In 1900 a Special Court was established for the trial of cases of High Treason and crimes of a political character. During the lifetime of the Special Court, the quorum of the Supreme Court, the Eastern Districts Court, and the High Court of Griqualand was reduced to a single judge. In 1904 the Special Court and the Special Courts for the trial of Mining Offences were abolished, and single judge courts, termed Divisional Courts, were established. The Divisional Courts were empowered to sit at all times, and appeals lay to the Supreme Court. The Native Territories

Penal Code was amended and appeals and reviews, which had previously gone to the Chief Magistrate, now lay to the superior courts.

In 1905 the Divisional Courts were empowered to hear appeals from the resident magistrates' courts; and in cases of appeal from the Divisional Courts, the judge in question was precluded from sitting as a member of the Appeal Court. In 1907 the High Court of Griqualand was reduced to a single judge court and provision was made for the Judge President to retire on pension. Finally when the union of Southern African States was achieved in 1909, a single Supreme Court of South Africa was established 'with an Appellate Division at its apex, and provincial and local divisions at its foundations'. The Cape Supreme Court became a provincial division of the Supreme Court; and the Eastern Districts Court, the High Court of Griqualand and the various circuit courts became local divisions. The Cape superior courts retained their original jurisdiction and the judges remained in office with the same rights to salary and pensions as had prevailed in the colony.

During the twilight years the Eastern Districts Court was under the constant shadow of dismemberment, but it managed to retain its Bench of three judges. The High Court of Griqualand did not fare as well as the Eastern Districts Court and it was reduced to a single judge court in 1907.

With the abolition of the Court of Appeal in 1886, the Grahamstown and Kimberley courts were explicitly bound to follow the decisions of the Supreme Court. The doctrine of stare decisis was recognized because of its 'expediency and its equity in giving expression to legitimate expectations'. A pronouncement by the Supreme Court, though it could be rejected by the court itself if clearly shown to be wrong, was (subject to certain exceptions) absolutely binding on the other courts. However it would appear that when Divisional Courts were established in 1904;

'No Bench-not even one of a single judge-need have followed the ruling of a Divisional Court'.

This resulted in a divergence of views on some important legal questions. Even the mighty Chief Justice when sitting as a Divisional Court judge, however, could have been overruled by a full Bench of the Supreme Court. Finally evidence that judicial precedent had become firmly entrenched as a source of law was reflected in the following criticism which appeared in the Cape Law Journal of 1893;

'(O)ur reports are getting voluminous. Our barristers are getting into the position of being able (in many cases) to quote So v. So instead of Voet, Van Leeuwen, Grotius, Van der Linden and other authorities, and stare decisis is the general cry, even echoed by our judges.'

APPENDIX 1

BIOGRAPHICAL SKETCHES OF THE CAPE COLONIAL JUDGES
(Arranged in Alphabetical Order)



THE HON. SIR J. D. BARRY (KNT.),

SENIOR PUISNE JUDGE OF THE SUPREME COURT OF THE CAPE OF GOOD HOPE,
AND JUDGE PRESIDENT OF THE EASTERN DISTRICTS' COURT.

BARRY, SIR JACOB DIRK

Jacob Dirk Barry was born in Swellendam on 14 June 1832. He was the second son of Joseph Barry, founder of the commercial empire of Barry and Nephews, and his wife, Johanna van Reenen, daughter of Dirk Gysbert van Reenen. After attending school at Swellendam he was sent to Cheltenham College, England. He completed his education at Trinity College, Cambridge, where he obtained a first class in the Moral Science Tripos in 1854. He entered the Inner Temple in 1855 and was called to the Bar on 17 November 1858. After brief experience on the Home Circuit, he returned to the Cape and was admitted as an advocate on 22 December 1859. He practised at Cape Town until 1865, when he moved to Grahamstown. He was elected to the House of Assembly in 1864, and sat in the famous Parliament which met at Grahamstown in that year. In 1866 he was appointed acting Solicitor-General and had to resign his parliamentary seat. In 1867 he was again returned to Parliament as a member for Aliwal North, in company with John X. Merriman, his brother-in-law. In October 1871 he was appointed Recorder of Griqualand West. He opened the High Court at Barkly West, afterwards moving with it to Kimberley in 1873. In 1875 he was made an official member of both the Legislative and the Executive Council, under Sir Richard Southey. He was called upon to act as administrator on two occasions. When Lord Carnarvon proposed his scheme for the federation of Southern African

territories, Barry was elected to represent Griqualand West at the intended conference which, however, never took place. In 1878 he received a knighthood in recognition of his services at Kimberley, and particularly for the part he played in suppressing the Korana and Batlapin revolt. In the same year he was appointed to the Supreme Court Bench and was assigned to the Eastern Districts Court in Grahamstown. On 27 January 1880 he was made Judge President, and was given a seat on the Court of Appeal. In 1881 he was appointed Chairman of the Commission on Native Laws and Customs, and in 1891 he was Chairman of the Commission on the Educational System of the colony. He was also on the Councils of Both St. Andrew's College and the Diocesan School for Girls in Grahamstown. His 'main characteristic', whether off the Bench or on it, was an untiring activity, both physical and intellectual. He was certainly a man of unflagging energy; on occasion forcing his court to sit until after midnight, and sometimes even to sit at half-past six in the morning. He was fond of outdoor pursuits and his principal recreation was farming. He married Charlotte Merriman in 1867 and they had four sons and three daughters. He retired on 1 August 1901, and died at Queens-town on 14 September 1905.

* A.A. Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.348; Sir Jacob D. Barry, Cape Law Journal, vol.17, 1900, p.213; A.M.Lewin Robinson, Sir Jacob Dirk Barry, in C.J.Beyers, Dictionary of South African Biography, Durban : Butterworths, 1981, vol.4, p.19.



SIR SYDNEY SMITH BELL.

BELL, SIR SYDNEY SMITH

Sydney Smith Bell was born in London in 1805. He was the ninth son of William Bell, who had been a wealthy merchant and banker of Dundee, but at the time of Sydney's birth a series of misfortunes had reduced the family to comparatively straitened circumstances. He was obliged to leave home at 15, and became apprenticed to a solicitor in Edinburgh. As a young solicitor he pursued his studies at Edinburgh University with a view to joining the Scottish Bar, but in 1829 'excessive application to his work induced a disease which confined him to his room for the long period of ten years'. During this period he altered his original intentions and resolved to read for the English Bar. In 1839 his health recovered and he was able to complete his 'dinners'. He was called to the Bar by the Inner Temple on 3 May 1839. He established a successful practice in London and published a Digest of Decisions of the Court of Sessions. This brought him to the notice of the Lord Chancellor, who appointed him judicial reporter to the House of Lords in Scottish appeals. While holding that office he published seven volumes of reports, and in 1847 produced a work on Real Property as affected by the Relation of Husband and Wife. By 1851 he had become known not only as a 'voluminous author on legal and professional topics', but also as a 'keen and able pleader of outstanding character'. After the death of Judge Menzies, it was apparent that Bell, with his mastery of

Roman and Scottish law, would be a valuable addition to the Cape Bench. He was accordingly appointed a Judge of the Cape Supreme Court on 9 June 1851. Dignified, with, however, a modicum of Scottish humour, he soon created a favourable impression, though he admitted that, before coming to the Cape, he had had no experience of the trial of criminal offenders. Insistent on traditional decorum, he required, during his initial circuit, that advocates appear in court wearing wigs. After Sir John Wylde retired, he was appointed acting Chief Justice. However he was obliged to step down when Sir William Hodges was appointed Chief Justice in March 1858. The colonists were genuinely disappointed to learn that he had been passed over in favour of Sir William Hodges, and the Bar and side-bar presented him with glowing addresses. In 1864 he was again called on to act as Chief Justice during Hodges' leave, and on the latter's death in August 1868, he was appointed to act for the third time. The appointment was made permanent in December, and he received the customary knighthood. On 18 August 1873 he suffered a paralytic stroke, but refused to resign until he was granted what he considered to be an adequate pension. The government was forced to accede to his request, and he retired on 22 December 1873 with the desired pension. He spent his remaining years in London, where he died in 1879 at the age of 74. As a judge he had excellent qualifications and from the day of his arrival at the Cape, 'his position in the front rank of South African

judges was established'. He caused some offence at first by pronouncing sentences not quite suited to the peculiar state of the local society, but experience soon rectified this error and litigants and criminals alike recognized him as an 'independent, acute and highly principled judge'. The Cape Monthly Magazine of 1859 described him as accurate and careful', and 'strongly opposed to every kind of laxity of practice'. His judgments displayed a 'happy combination of great learning and sound common sense'. He was always a glutton for work and during his leisure hours he wrote a work entitled the Colonial Administration of Great Britain. It was he who, as Chief Justice, first encroached on the established practice of the Court of sitting from 10.15 a.m. to 4 p.m. without a break. In 1871 he introduced a five minute interval at one o'clock, which was gradually lengthened until in 1873, when de Villiers took office, it was arranged that there should be a regular adjournment from one to two o'clock. He is also credited with being the first judge to discard the old ox-transport for the lengthy circuits, and to use an old fashioned landau and a team of horses. In private life he was a studious man and a classical scholar of some distinction. He also took a great interest in education, and when the University of the Cape of Good Hope was established in 1873, he was the first member to be nominated to its Council. He was extremely temperate in his habits and somewhat reserved by nature. However he possessed a sense of humour and could appreciate a joke at his own expense, though his dignified appearance and

manner prompted Judge Cole to liken him to 'a respectable London butler out of place'. In time his physical disabilities appear to have 'ruffled his temper and increased his eccentricities', and his conduct on the Bench became somewhat rude and overbearing. On one occasion the Attorney-General, William Porter, informed him in court that his manner towards the Bar was felt to be very offensive. He apologized and the matter ended; 'but he was certainly more guarded in his language in the future'. He was always a stickler for accuracy and disliked any laxity of practice. He abhorred any ignorance of the law, and the magistrates continually tried his patience in appeals and reviews. The Bar, which had suffered under his tongue, presented the following address on his retirement;

'During the twenty-three years of your career as a judge, your learning and industry, your independence and your zeal for truth and justice have been acknowledged by the whole Colony, and none are better able to bear testimony to your possession of these high qualities that we who now address you.

The soundness and ability of your judgments, and the keen penetration which enabled you alike to unravel complicated facts and to distinguish between apparently conflicting cases will long remain among the traditions of the Court over which you presided, and remind us of the loss we have sustained by your absence from the Bench...'

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p. 348-9; F.St.Leger, The Honourable Sir Sydney Smith Bell, South African Law Journal, vol.50, 1933, p.437; A.F.Hattersley, Sir Sydney Smith Bell, in D.W.Krüger, Dictionary of South African Biography, Cape Town : Tafelberg, 1972, vol.2, p.51; Chief Justice Bell, Union Law Review, 1910, p.254.



THE HONOURABLE MR. JUSTICE BUCHANAN,

ACTING CHIEF JUSTICE OF THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

BUCHANAN, SIR EBENEZER JOHN

Ebenezer John Buchanan was born in Pietermaritzburg on 8 March 1844. He was the second son of Ebenezer Buchanan, a misionary, and his wife, Jane Cowan. He went to school at Pietermaritzburg and began a journalistic career on the Natal Witness. He was later on the staff of The Times of Natal, and, as a proficient shorthand-writer, he became parliamentary reporter to The Natal Mercury. In 1866 he moved to the Cape Colony, where he worked for the Cape Argus and edited the Mercantile Advertiser. Thereafter he travelled to England and entered the Inner Temple in 1869. He was called to the Bar on 27 January 1873 and returned to Cape Town, where he was admitted as an advocate on 15 May. He quickly acquired a busy practice, and was elected to the House of Assembly as the member for Worcester in 1877. He went on active service with the Duke of Edinburgh's Own Volunteer Rifles during the Ninth Frontier War. In 1878 he married Mary Mudie, daughter of the Cape Town Merchant, Douglas Mudie. They had three sons and one daughter. The eldest son, Douglas Mudie Buchanan, became a prominent member of the Cape Bar. In 1879 he was sent by the Governor on special service to Griqualand West, where he was appointed acting Attorney-General. As acting Attorney-General he played an active part in resolving the many difficulties which beset the path of annexation. He was offered the permanent post of Attorney-General, and also the Recordership; both of



MR. JUSTICE JAMES BUCHANAN.

BUCHANAN, JAMES

James Buchanan was born in Cape Town on 21 September 1841. He was the son of William Buchanan, a Cape Town educationist and journalist, and his wife, Maria Dorothea McDonald. After completing his schooling at Dr.A.N.E.Changuion's private school in Roeland Street, Cape Town, he became a student at the South African College, where he obtained the Second Class Certificate in Science and Literature and the First Class Certificate in Law and Jurisprudence. He was already an experienced journalist, having begun to help his father in the Press Gallery in Parliament, and in the courts, when he was only fifteen. He founded the first student newspaper in South Africa, The Student's Oracle, and, on completing his studies, he was appointed stenographer to the House of Assembly. On 1 February 1865 he was admitted to the Cape Bar. He was soon recognized as a rising star and was awarded a large share of the circuit prosecutions. In 1867 he married Miss E.H.Harris, a daughter of a Mossel Bay merchant, and settled down in Cape Town. In 1870 he edited the Menzies Reports and also found time to launch, in conjunction with F.W.Reitz and J.Halkett, the popular satiric weekly, The Squib. In 1872 he was elected to the House of Assembly as the member for Victoria West. However he gave up his seat to become Staats-Prokureur at Pretoria on 9 December 1872. With the assistance of one clerk and without a permanent office or organized correspondence, he reorganized the

administration of criminal law in the Transvaal. During this time, he became a proficient Dutch scholar, but 'lost his health and emptied the family purse'. Accordingly in 1875, President Brand experienced little difficulty in securing his services as a puisne judge in the recently established High Court of the Orange Free State. Chief Justice Reitz and Judge Buchanan opened the court on 21 February 1876 and subsequently delivered numerous well-founded judgments. During his stay in the Free State Buchanan published Precedents in Pleading (1878) and Decisions in Insolvency (1879). He also played an important part in the cultural life of Bloemfontein. He founded the Bloemfontein Literary and Scientific Society and became its first Chairman. He also helped to found the National Museum and the first library in Bloemfontein. In journalism he did pioneer work by launching the Orange Free State Monthly Magazine. In 1880 he was offered and accepted the Recordership of Griqualand West. In September 1882 he became the Judge President of the High Court of Griqualand, which position he occupied with distinction until he was obliged to resign in September 1887 because of poor health. During his stay in Kimberley, he published several volumes of Johannes Voet's Commentarius ad Pandectus. At Kimberley he worked energetically in founding and improving the public library, and he contributed frequently to the South African Press. As a learned judge, he proved to be a tower of strength, and it is interesting to note that he was one of the few judges to receive his

entire education in the colony. He was a brilliant law student at a time when the local law reports and text-books did not exist, and he belonged to that band of pioneer judges who did so much to elucidate the Roman Dutch Law and lay the foundations of the Common Law. Out of his marriage to Emma Henrietta Harris, nine children were born, and, out of his marriage to Amy St. Leger Bertram Gordon, one daughter. One of his sons, William Porter Buchanan, became a successful advocate. After his retirement he travelled to England, where he died on 10 December 1893.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.351; F.St.Leger, The Hon.Mr.Justice James Buchanan, South African Law Journal, vol.50, 1933, p.137; J.C.Moll, James Buchanan, in D.W. Krüger, Dictionary of South African Biography, Cape Town : Tafelberg, 1972, vol.2, p.95.



THE HONOURABLE SIR WILLIAM WESTBROOKE BURTON,
K.C.B.

BURTON, SIR WILLIAM WESTBROOKE

William Westbrooke Burton was born in Daventry, Northhamptonshire on 31 January 1794. He was the fifth son of Edmond Burton, town clerk of Daventry, and his wife, Elizabeth Mather. After attending grammar school at Daventry, he joined the navy as a cadet in 1807. In 1811 he was wounded in action in the Mediterranean, and in 1814 he took part in the naval operations against the Americans. After leaving the navy, he entered the Inner Temple on 27 November 1819 and was called to the Bar on 26 November 1824. He commenced practice in the Court of Common Pleas and seems to have met with success almost immediately. In 1826 he was appointed Recorder of Daventry. On 15 April 1827 he married Margaret Smith of Homerton. Early in 1827 he was appointed to the Bench of the newly-constituted Cape Supreme Court. He was originally designated as senior puisne in the draft Charter of Justice, but had to step down in favour of Judge Menzies. Soon after receiving his appointment, he travelled to Holland to study the Dutch language and Roman Dutch Law. He returned to England after six months, and sailed for the Cape with his brother Clerke Burton. The latter was appointed master of the Supreme Court. He was sworn in at Cape Town on 10 December 1827, and took his seat at the first sitting of the Supreme Court on 1 January 1828. Together with Judge Menzies, he shared the responsibility of drafting many of the important Ordinances of the day. In

particular, he took a major part in drafting the Insolvency Ordinance and Ordinance No.50, which gave the 'Hottentots and other persons of colour' civil and political equality with the whites. In 1829 he published a work entitled Observations on the Insolvent Law of the Colony of the Cape of Good Hope. With the exception of a translation of part of Van der Linden published in 1822 by P.B.Borchards, Burton's work was the first South African legal textbook. Apart from his official duties, Judge Burton took an active part in the numerous social and philanthropic activities in the colony. He took a keen interest in education and was a foundation subscriber of the South African College. He was a member of its first Council and, as Vice-President, was one of the Council's representatives on the Senate. On 1 March 1832 he was appointed to the Bench of the New South Wales Supreme Court, and he left the Cape in November of that year. His period of office in the Cape Colony had been during the difficult time of reconstruction and discontent, but he nevertheless left the impression of being a sound lawyer and a hard-working man, and his departure was generally regretted. In Australia, he published a textbook entitled Treatise on Laws affecting Insolvencies in New South Wales. After serving for ten years on the Sydney Bench, he was appointed a puisne judge at Madras and received a knighthood. At the age of sixty-three he retired to England. He returned to New South Wales in 1858 and was elected President of the Legislative Council.

During this time he wrote a book entitled The State of Religion and Education in Australia. In 1862 he finally retired from public life and returned to England. He died on 6 August 1888, having reached his ninety-fifth year.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.352; F.St.Leger, The Honourable Sir W.W.Burton, South African Law Journal, vol.52, 1935, p.257; A.F.Hattersley, Sir William Westbrooke Burton, in W.J.de Kock, Dictionary of South African Biography, Cape Town : Tafelberg, 1968, vol.1, p.139.



MR. JUSTICE CLOETE.

CLOETE, HENDRIK

Hendrik Cloete was born in Cape Town on 15 June 1792. He was the eldest son of Pieter Lourens Cloete, Vice-President of the Orphan Chamber, and his wife, Catharina Maria van Reenen. He received his early education at the first English school at the Cape, which was opened by the Rev. Weaving in 1797. At the age of ten he was sent to Holland. After studying at Groningen, Naarden and Beverwijk, he qualified for admission as a law student at Utrecht. In his final year he proceeded to Leyden University, where he was placed under the supervision of Professor D.G.van der Keessel. In 1811 he was awarded a doctorate in law for his thesis entitled Thesis Philologico-Juridicae. In order to avoid being conscripted by the French in the war with Britain, he made his way clandestinely to England. He entered Lincoln's Inn, where he studied under Sir Samuel Toller, the special pleader. However his father urged his early return to the Cape, and he obtained a passage on the frigate Java. On 30 December 1812 the Java was engaged in a battle with the United States frigate Constitution, and it was compelled to surrender. Cloete was taken on board the Constitution, and the Java was blown up. The American commander, who had been in the Merchant Service and had known Cloete's father at the Cape, treated him with the greatest kindness and put him ashore at San Salvador. Cloete made his way to Rio de Janeiro, where he managed to obtain passage to the Cape.

Shortly after arriving at the Cape in June 1813, he was appointed Deputy-Secretary to the Court of Justice. In 1816 he married Christine Helen Graham and commenced practice at the Cape Bar. He soon built up a large practice, and in April 1836 he was nominated as an unofficial member of the Legislative Council. On 12 May 1843 he was sent as a Special Commissioner to Natal to effect a settlement with the Natal Volksraad. After settling the matter of submission with the Boers, he proceeded to hold negotiations with the Zulu King, Mapande. After concluding a treaty by which the boundary between Natal and Zululand was fixed, and St. Lucia Bay ceded to Great Britain, he sailed for the Cape on 24 April 1844. Natal was formally annexed in August 1845, and in October Cloete was appointed Recorder of the District Court of Natal. Matters went smoothly until March 1853, when, as a result of the proceedings in the case of Meller v. Buchanan, the Lieutenant-Governor, Sir Benjamin Pine, accused him of allowing private and personal feelings to interfere with the fair and impartial administration of justice. In London, the Law Officers of the Crown considered that a prima facie case existed against Cloete, and the Natal Legislative Council was instructed to hold an inquiry. The inquiry culminated in an order suspending him from the discharge of his duties as recorder. Cloete appealed to the Privy Council, and on 20 February 1854 the Judicial Committee recommended that the order of suspension be rescinded on the ground that it was 'frivolous and unfounded',

and that he should be restored to office. They also recommended that he should be 'indemnified for the expenses to which he has been unjustly put'. When Cloete returned to Pietermaritzburg in July, houses were illuminated and 'the welkin rung with the cheers and hurrahs for the Queen and her judges'. On 29 July 1855 he was informed that the Secretary for Colonies had decided to appoint him to the Bench of the Cape Supreme Court. His appointment was confirmed on 3 November 1855. In November 1859 the following account appeared in the Cape Monthly Magazine;

'On the Bench he is distinguished, not alone for his deep research and his extensive knowledge of the law he administers, but also for the readiness with which he brings his learning to bear on the case before him. As soon as the gentlemen of the Bar see him opening one of his ponderous volumes of Voet, they know that he will be ready with some quotation from the great commentator, exactly meeting the point under argument. His memory, indeed, is remarkable. It would, perhaps, be impossible for an advocate to misquote, even by a couple of words, and sentence from Johannes Voet or Hugo Grotius, without the error being instantly detected and corrected by Mr. Cloete from memory alone. He is clear headed and quick; so quick in perception of the true bearings of a case that young advocates are disposed to think him hasty in showing no great inclination to listen to their harangues when they would lead him off the true scent; and suitors are occasionally vexed that he makes light of arguments which are wide of the exact point before him. But when he comes to sum up the case, those who listen dispassionately will confess that he has thoroughly understood it and will admire the acuteness with which he separates the wheat from the chaff in the arguments at the Bar, the clearness with which he expounds the law applicable to the circumstances discussed, and the felicity and copiousness of his quotations from the authorities. Indeed, an elab-

orate judgment from Mr. Justice Cloete, on an important question, is itself an excellent lesson in Roman-Dutch law.'

In criminal cases he had the reputation of being a 'convicting judge'. But it was never said of him that he was unjust, although, on occasion, he gave vent to somewhat strong expressions and rebukes, being of an irritable temperament. On circuit he was sometimes in conflict with local prejudice, and his permission for two Coloured men to sit as jurors during the sessions at Burgersdorp in 1859 caused some dismay. His passionate absorption in Roman Dutch Law, when combined with a surprisingly wide knowledge of English jurisprudence, enabled him to exercise a notable influence on legal development in South Africa. He retired on pension in October 1865, but returned to the Bench as an acting judge during Judge Bell's absence in London in 1866. He died at Newlands on 26 December 1870 at the age of eighty.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.253; J.H.de V.Cloete, Mr. Justice Cloete, South African Law Journal, vol.51, 1934, p.1; Mr.Justice Cloete, Union Law Review, 1910, p.87; A.F.Hattersley, Hendrik Cloete, in W.J.de Kock, Dictionary of South African Biography, Cape Town : Tafelberg, 1968, vol.1, p.171.



MR. JUSTICE A. W. COLE.

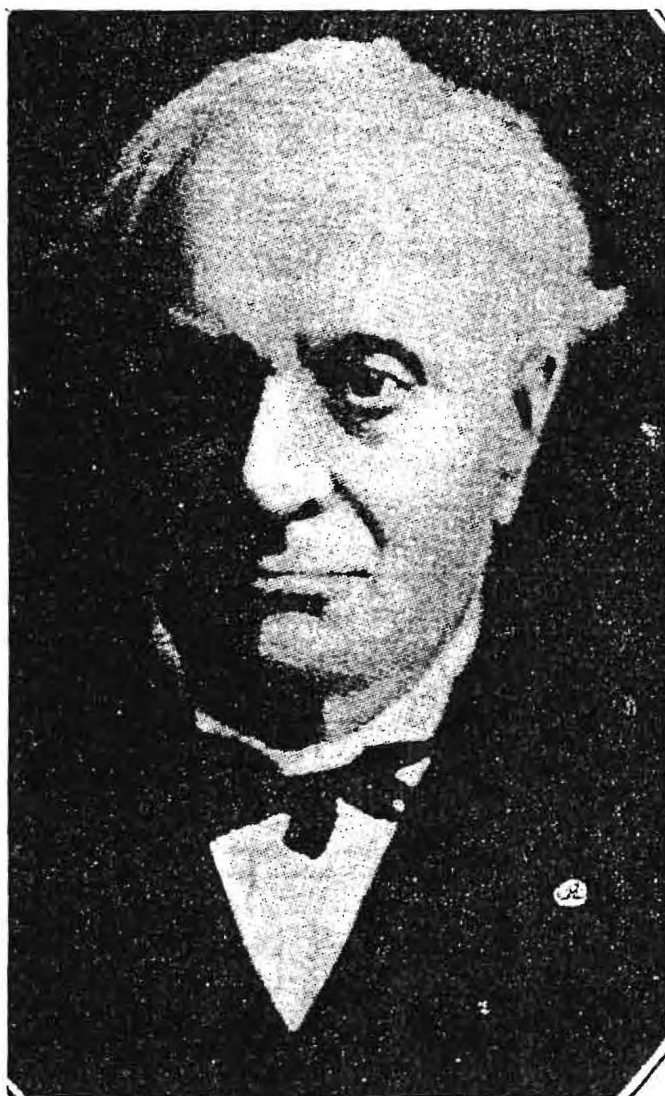
COLE, ALFRED WHALEY

Alfred Whaley Cole was born in Highbury, London in January 1823. He was a son of George Cole, a member of one of the most respected families in Middlesex. His parents died when he was quite young and he was adopted by his uncle, Peter Cole, who was a solicitor with an extensive and exclusive London practice. After attending a private school, he went to the University of London and entered the office of his uncle as a clerk. However he disliked the dull respectability of a clerical career and he resolved to emigrate to New Zealand. In March 1841 he set sail in the Prince Rupert, but the ship sank in Table Bay. Cole was rescued, but lost all his possessions. However he soon made good friends and travelled over a considerable part of the colony. He spent five years in the Cape before returning to England in 1846. He entered the Middle Temple and was called to the Bar on 25 January 1850. However briefs were scarce and he had to supplement his income by writing for the London Daily News. In 1852 he published a work entitled The Cape and the Kaffirs, or notes of five years' residence in South Africa. He also published a number of novels during this period. He returned to the Cape on 19 July 1856 and was admitted as an advocate of the Supreme Court on 26 July. After a slow start, he built up an extensive practice and began to participate in public affairs. He was elected to the House of Assembly as a representative of the Cape Division in

1864, but resigned the following year. At a later date he represented Albert (1867-77), King William's Town (1869) and Colesberg (1875-77). In 1868 he acted as Attorney-General, and later in the year he was appointed to the Grahamstown Bench as an acting judge. In 1880 he was offered the Judge Presidency of the High Court of Griqualand, but refused the honour. His wife, Jeannette Cloete, had died in September 1879 and he was in a poor state of health at the time. However he consented to act as senior puisne until Sydney Twentyman Jones was appointed. In 1885 he was once again appointed to act as a judge at Grahamstown. In 1887 a vacancy occurred in the High Court and Cole was given an acting appointment. By this time he had become extremely deaf and could only hear with the assistance of tubes. However after personally testing his ability to hear proceedings, the Attorney-General offered to make the appointment permanent. Cole accepted and the appointment was confirmed in March 1888. Unfortunately his hearing grew worse and he was compelled to resign on 14 September 1891. Although he was trained in English law, he was nevertheless a great exponent and admirer of the Roman-Dutch system. However his eminence as an advocate was more pronounced than his prestige on the Bench. On the Bench he had the reputation of being most fair-minded and courteous, although towards the end he was considerably hampered by his lack of hearing. As a draftsman he showed great ability and for many years acted as parliamentary draftsman. He was a classical scholar

and his knowledge of English literature was profound. At the Cape he was, for a time, part editor of the Cape Monthly Magazine and the South African Magazine. His final work entitled Reminiscences of My Life and of the Cape Bench and Bar was brought out soon after his death on 26 December 1896. Out of his marriage to Jeannette Cloete one son was born. He subsequently married Henrietta Mary Cloete and they had four children.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.353-4; F.St.Leger, The Honourable Mr.Justice Alfred Whaley Cole, South African Law Journal, vol.52, 1935, p.1; A.F.Hattersley, Alfred Whaley Cole, in D.W.Krüger, Dictionary of South African Biography, Cape Town : Tafleberg, 1972, vol.2, p.136.



SIR HENRY CONNOR

CONNOR, SIR HENRY

Henry Connor was born in Dublin, Ireland on 27 September 1817. He was the eldest son of Roderick Connor, Master in Chancery, and his wife, Maria Bourne. On 1 July 1833 he entered Trinity College, where he obtained a B.A. degree in 1837. Concurrently, he became a student in King's Inn in October 1835. In 1837, after having kept nine terms at King's Inn, he travelled to London, where he entered the Inner Temple on 10 January 1838. He kept seven terms there, before returning to Dublin in July 1839. He was called to the Bar at King's Inn in October 1839. In 1841 he obtained the LL.B. degree from Trinity College, and commenced practice. In 1849 he was appointed Registrar of Friendly Societies in Dublin. In July 1854 he was appointed Chief Justice and Judicial Assessor of the Gold Coast. Within two months of his arrival there, he was appointed acting Governor and continued to administer the government until March 1857, when he returned to England on leave. In November 1857 he was offered and accepted the first puisne judgeship of Natal. However he was only able to reach Natal on 4 June 1858. Connor came to Natal with notable credentials, and his position in Natal represented a drop in status in comparison with his previous appointment. Three years after his arrival, he returned to England, ostensibly for 'urgent private affairs', but primarily to seek 'promotion in the service'. He was offered the Chief Justiceship of British Honduras, but he

declined the appointment and returned to Natal. In June 1864 he applied to the Cape Governor for an appointment to the, soon to be established, Eastern Districts Court. The Cape Governor selected him as the senior puisne judge at Grahamstown, where he presided for eighteen months. However the Secretary for Colonies refused to confirm Connor's appointment, because he considered it 'irregular for a Governor to move a Judge from one Colony to another'. When British Kaffraria was annexed to the Cape, Connor had to give up his seat in favour of the Kaffrarian judge, Fitzpatrick. Connor returned to Natal in July 1866. In December Connor again took up the matter of his promotion. In March 1867 the Cape Governor proposed that Connor should act as a judge of the Cape Supreme Court during the temporary absence of Watermeyer, and that he should succeed him in the event of a vacancy, which appeared probable. Connor was offered the choice between a judgeship at the Straits Settlement, Nisaddad, and the post outlined by the Cape Governor. He accepted the latter and took his seat on the Cape Bench on 20 August 1867. Judge Watermeyer died in November, and Connor was offered the third puisne judgeship. However, he initially declined the appointment because it placed him in junior position to his erstwhile junior, Denijssen. He subsequently changed his mind, but the Colonial Office refused the belated acceptance and Connor was obliged to return to Natal. In 1874 he was appointed Chief Justice of Natal, and in 1880 he was knighted. He died in harness on 12 July 1890. On

his departure from the Cape Bench in 1868, he received the following address from the Bar;

'The profound and varied learning, the keen and logical acumen, the thorough mooting of the principles of our Law which have characterised your Lordship's Judgements will remain indelibly recorded in the Archives of the Supreme Court, but beyond all these excellencies we have to acknowledge the courteous urbanity, patience and temper which have lent dignity to all your Lordship's utterances and have made our own tasks in pleading before you so grateful.'

Because of his many excellent qualities, Connor came to be regarded as one of the finest judges in South Africa at the time.

* P.R.Spiller, The Natal Supreme Court : Its Origins and Early Development (1858-1874), Unp. Ph.d. thesis, University of Natal, 1982, p.130; A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.354; A.F.Hattersley, Sir Henry Connor, in D.W.Krüger, Dictionary of South African Biography, Cape Town : Tafelberg, 1972, vol.2, p.140.



THE LATE HON, PETRUS J. DENYSSEN.
FORMERLY A PUISNE JUDGE OF THE
SUPREME COURT, CAPE COLONY.

DENIJSSSEN, PETRUS JOHANNES

Petrus Johannes Denijssen was born in Cape Town on 18 August 1811. He was the son of Daniel Denijssen, Fiscal at the Cape, and his wife, Magdalena Elizabeth Smuts. After attending the South African College, he accompanied his parents to Holland in 1830. After obtaining the degree of doctor of laws from the University of Leyden, he entered the Inner Temple and was called to the Bar on 18 November 1836. At the Inner Temple he read law in the chambers of Sergeant Wylde, afterwards Lord Truro, Lord High Chancellor, and brother of Sir John Wylde. He returned to the Cape and was admitted as an advocate on 12 July 1837. However he left the Bar in 1840 and became secretary to the Cape Town Municipality. After fifteen years' service with the Municipality he returned to the Bar in 1856. He built up an extensive practice, and in March 1863 he was appointed acting Attorney-General during Porter's absence. In the following year he drafted the Act constituting the Eastern Districts Court. In 1865 he was appointed to the Bench and was assigned to Grahams-town as fifth puisne judge. On 1 September 1868 he was transferred to Cape Town, where he held the post of senior puisne judge until he retired in 1877. Soon after he retired, he settled in Germany, where he died at Bonn on 15 November 1883. Judge Denijssen was a man of determined character, but of a very generous and affectionate disposition. His manner on the Bench was always courteous and dignified. He also manifested great common sense and ability as a judge.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.355; The Late Hon. Petrus J.Denyssen, South African Law Journal, vol.20, 1903, p.221.



THE RIGHT HON. SIR J. HENRY DE VILLIERS, K.C.M.G.,
CHIEF JUSTICE OF THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

DE VILLIERS, JOHAN HENDRIK

Johan Hendrik de Villiers was born in Paarl on 15 June 1842. He was the second son of Carel Christiaan de Villiers, a government land surveyor, and his wife, Dorothea Elisabeth Retief. He received his early education at Paarl, under Rev. Inglis. In 1853 he went on scholarship to the South African College. After obtaining a Second Class Certificate in Literature and Science in 1861, he went to the University of Utrecht to study for the ministry. However, after eighteen months, he decided that he was not suited to the ministry, and he proceeded to the University of Berlin to study medicine. In 1863 he again changed his mind and entered the Inner Temple. He was called to the Bar on 17 November 1865. He returned to the colony and was admitted as an advocate on 18 January 1866. Although his academic legal training was meagre, he had travelled and read widely. He read Latin with ease and mastered Dutch and German. He also knew French and Greek. The Attorney-General, William Porter, became his mentor at the Bar, and in 1867 he was elected to the House of Assembly as one of the members for Worcester. On 1 December 1872 he became Attorney-General in Molteno's Cabinet, and on 9 December 1873 he was appointed Chief Justice. Public reaction to his appointment was 'a mixture of approval and criticism based on his youth, alleged jobbery and alleged early milking by responsible government of its political talent'. He presided over

the Commission of Inquiry into the administration of justice in 1874-75, which recommended that the Chief Justice should cease to be President of the Legislative Council. Nevertheless, and despite, at times, 'the trying duty of saving cabinets he did not care for, by using his vote, de Villiers enjoyed his role, which he played well'. On several occasions he was offered high political office, but declined. However, when Rhodes secretly offered him the premiership in 1893, he agreed to accept the responsibility on certain conditions. When Rhodes decided to form a new ministry as an alternative course it was a bitter blow to de Villiers. Although 'his political hopes turned to ashes' he rendered valuable service to the state in other ways. He played a major part in the creation of the University of the Cape of Good Hope in 1873, and was Chairman of the Education Committee of 1880. He was a member of the Transvaal Royal Commission of 1881, and was primarily responsible for drafting the Pretoria Convention. In 1887 he was appointed Chairman of the Diamond Trade Laws Commission, and his recommendations which upheld trapping and trial without jury were largely translated into the Diamond Act of 1888. In 1897 he mediated in the judicial crisis in the Transvaal, but was unable to prevent the dismissal of Chief Justice Kotzé. To de Villiers, 'the creation of a Court of Appeal in 1879 was galling for, though it did not hear civil appeals from the Supreme Court, its composition implied partial recognition of the courts at Grahamstown and Kimberley'. Yet,

he was always in favour of a common court of appeal for the states and colonies of Southern Africa, 'for this was centripetal, not a centrifugal movement'. He played a notable part in the National Convention of 1908. He presided over the plenary meetings of ten of the seventeen Committees, frequently participated in debate, particularly to iron out party political differences, and drafted amendments to resolve difficulties. He firmly supported the entrenchment of the Cape non-white vote. He was one of the delegates who went to Westminster to see the passage of the South African Act through the British Parliament. His direct contribution was mainly in the judicial provisions. However, under pressure, 'he had to allow provincial divisions much intermediate appellate work so as to uphold their prestige'. As a judge, de Villiers excelled in adapting Roman Dutch Law to modern conditions. He had a keen mind, an ability to grasp a legal principle, and a capacity to get to the root of a tangled matter. He was also praised for his firmness, his preparedness to use in subsidio rules from other legal systems, and his care not so to overstate the scope of a rule that the future legal development would be hamstrung. However according to Kahn;

'The deficiencies of De Villiers as a jurist were of some magnitude, and were enlarged by his virtual inability to confess error, partly, no doubt, because of his pronounced egoism. He had a tendency to over-import English law, to dismiss Roman-Dutch rules and occasionally even to fail to discover them... The range of authoritative works he consulted was not impressive, and his reference to persuasive civil

law authority was thin... In private law he tried to the best of his ability to uphold Roman-Dutch principles, but failed in many instances, and ended up by invoking English law. On the other hand he openly criticized "the uncertainty and want of precision which characterise the criminal law of Holland"..., and, in this sphere, imported much English law which, in some quarters, has met with serious, perhaps exaggerated criticism. In mercantile law, too, he confessed to a preference for many an English doctrine: law should follow trade, and trade was English.'

However de Villiers contributed more to posterity than his reported decisions. He was not adverse to invoking the equitable spirit pervading the Roman Dutch Law to achieve a fair result, 'even at the risk of bending rules to near breaking-point'. As a trial judge he was superb, and 'he left the judiciary with a cachet for excellence that was spread over all South Africa and to remain'. According to Kahn;

'De Villiers was a strong judge, always master of his court. No liberty or levity was tolerated. To him the parties or the accused deserved the courtesy of proceedings conducted with gravity and decorum. A model of dignified detachment and sober correctness, he listened carefully to both sides and was amenable to argument. Counsel knew he had lost his case only when De Villiers started delivering judgement, for he had a way of addressing himself to counsel for the loser... Formal, aloof and reserved, in his early years he tended to wear the dignity of his office as a mantle of protection. In the eighties the Chief Justice was a cold, austere man, much feared and little loved. Later he unbent a little, revealing at times his innate kindness.'

The status and independence of the Bench were matters close to his heart. His international reputation was enhanced when he was made a member of the Judicial Committee of the Privy Council on 7 July 1897. Unfortunately he was unable to sit regularly.

In 1871 he married Aletta Johanna Jordaan, daughter of Johannes Petrus Jordaan, a wine farmer of Worcester. Out of his marriage, two sons and two daughters were born. He was knighted in 1877 and received the K.C.M.G. in 1882. In 1910 he received a peerage, with the title Baron de Villiers of Wynberg. On two occasions he acted as Governor-General of the Union of South Africa. In 1902 he received an honorary LL.D. degree from the University of the Cape of Good Hope. He was appointed Chief Justice of the Union of South Africa on 31 May 1910, and died in harness on 1 September 1914 while acting as Governor-General. He was buried in the Maitland cemetery, Woltermade, on 7 September after a service in the Groote Kerk and a State funeral.

* Ellison Kahn, Johan Hendrik de Villiers, in W.J. de Kock, Dictionary of South African Biography, Cape Town : Tafelberg, 1968, vol.1, p.224; Eric A.Walker, Lord de Villiers and His Times : South Africa 1842-1914, London : Constable, 1925.

DE WET, SIR JACOBUS PETRUS

Jacob Petrus de Wet was born in the Cape Colony in 1828. After attending the South African College, he entered Leyden University on 27 November 1860. However he decided to move to England, where he took his B.A. degree at the University of London. He was called to the Bar by the Inner Temple on 6 June 1863. He then returned to the Cape, where he was admitted as an advocate on 14 December 1863. He moved to Grahamstown in 1865 and was the first advocate to be admitted to practice by the Eastern Districts Court. He represented Albert in the House of Assembly from 1869 to 1871. He also represented Grahamstown in 1875. He was appointed Solicitor-General in 1873. In 1879 he was appointed Recorder of Griqualand West, but resigned on 18 May 1880 when he was appointed Chief Justice of the Transvaal. According to Kotzé, de Wet was offered the appointment in March and was gazetted as Chief Justice on 20 April. Kotzé, who had originally been appointed Chief Justice, objected to de Wet being appointed over his head. However, before the complaint could be settled, the War of Independence broke out. After the war Kotzé was made Chief Justice and de Wet went to Ceylon, where he was acting Chief Justice from 1882 to 1883. He retired to England and died at Eastbourne on 19 April 1904. He was knighted on 2 July 1883.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.358.

DWYER, EDWARD

Edward Dwyer was born in Dublin, Ireland on 29 July 1821. He was the son of Thomas and Ellen Dwyer. He was educated at Trinity College, where he graduated with a B.A. degree in 1845, and obtained a L.L.D. degree in 1870. According to St.Leger he also obtained a M.A. degree. He practised at the Irish Bar until 1857, when he was called to the English Bar by Lincoln's Inn. For the next ten years he practised as a 'special pleader and conveyancer' on the Northern Circuit and at the Yorkshire, Preston and Manchester Sessions, attaining a substantial practice and reputation. In 1858 he published a work entitled A Compendium of the Principle Laws and Regulations relating to the Militia of Great Britain and Ireland. In June 1868 he was selected by the Lord Chancellor to fill a vacancy on the Cape Supreme Court Bench. He arrived at Table Bay on 14 August 1868, and a few days later took his seat on the Bench. He sat as junior puisne judge at Cape Town for six months before being transferred to the Eastern Districts Court, where he presided as senior judge. He remained at Grahamstown for the next ten years. During this time his wrath was stirred up on more than one occasion by his being called upon to fill temporary vacancies at Cape Town. In 1878 he was permanently transferred to Cape Town. Two years later he became senior puisne, and in 1881 he acted as Chief Justice. At Cape Town he sat in several important cases in which he dissented from

the majority of the court, and in which appeals to the Judicial Committee of the Privy Council were noted. In three of the cases the majority decisions were reversed. Despite the eulogies of the Eastern press, Dwyer was never considered to be a great lawyer and 'rather overrated his own abilities', although he was undoubtedly a hard-working judge. He was a man of great learning and ability, but 'he never felt at home with the Roman Dutch Law and, though he studiously endeavoured to administer the law as he found it, he often gave offence by making disparaging comparisons with the English system'. He was somewhat of a martinet and the slightest slackness in inferior court records caused an explosion. The injudicious expression of his thoughts undoubtedly assisted in partially ruining his popularity in the Eastern districts. In Grahamstown he frequently displayed a 'petulance and brusqueness utterly unbecoming the dignity of his office'. He was an emotional man imbued with a strong sense of justice and it was usually the wrongs of others which aroused his ire. Injustice between white and black tried him beyond measure and when the jury, amidst applause, acquitted the accused in the Koegas trials, he wrote a private letter to Saul Solomon, requesting him to take up the matter. In his declining years his conduct on the Bench provoked much criticism, especially when, in the Franks murder trial of 1884, he was involved in an unnecessary altercation with the prosecutor. Off the Bench he was kind and generous, and was loved by all who came

into contact with him. He was an ardent devotee of all forms of sport and social enjoyment. He was a familiar figure in Cape society and foremost in all social duties. Throughout his life he was a devout and strict Roman Catholic. Early in 1887 he had a sudden paralytic seizure which necessitated his retirement from the Bench on leave of absence. However he was obliged to resign in June, and he died on 29 July 1887. He left a wife and three sons.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.358; F.St.Leger, The Honourable Mr.Justice Edward Dwyer, South African Law Journal, vol.51, 1934, p.159; B.J.T.Leverton, Edward Dwyer, in D.W.Krüger, Dictionary of South African Biography, Cape Town : Tafelberg, 1972, vol.2, p.211.

EBDEN, JOHN WATTS

He was the son of John Bardwell Ebdon, businessman and politician at the Cape, and his wife, Adriana Kirchmann. He graduated at, and was made a Fellow of, Trinity Hall, Cambridge. He entered the Middle Temple and was called to the Bar on 28 May 1835. He returned to the Cape and was admitted as an advocate on 26 November 1839. He practised in Cape Town until his elevation to the Bench on 7 October 1854. He went on sick leave in October 1855, and retired soon thereafter. He lived near Cape Town until his death in January 1887. In 1868 he published a work entitled British Rule in South Africa.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.358.



W. Herbert & Co. London, Eng.

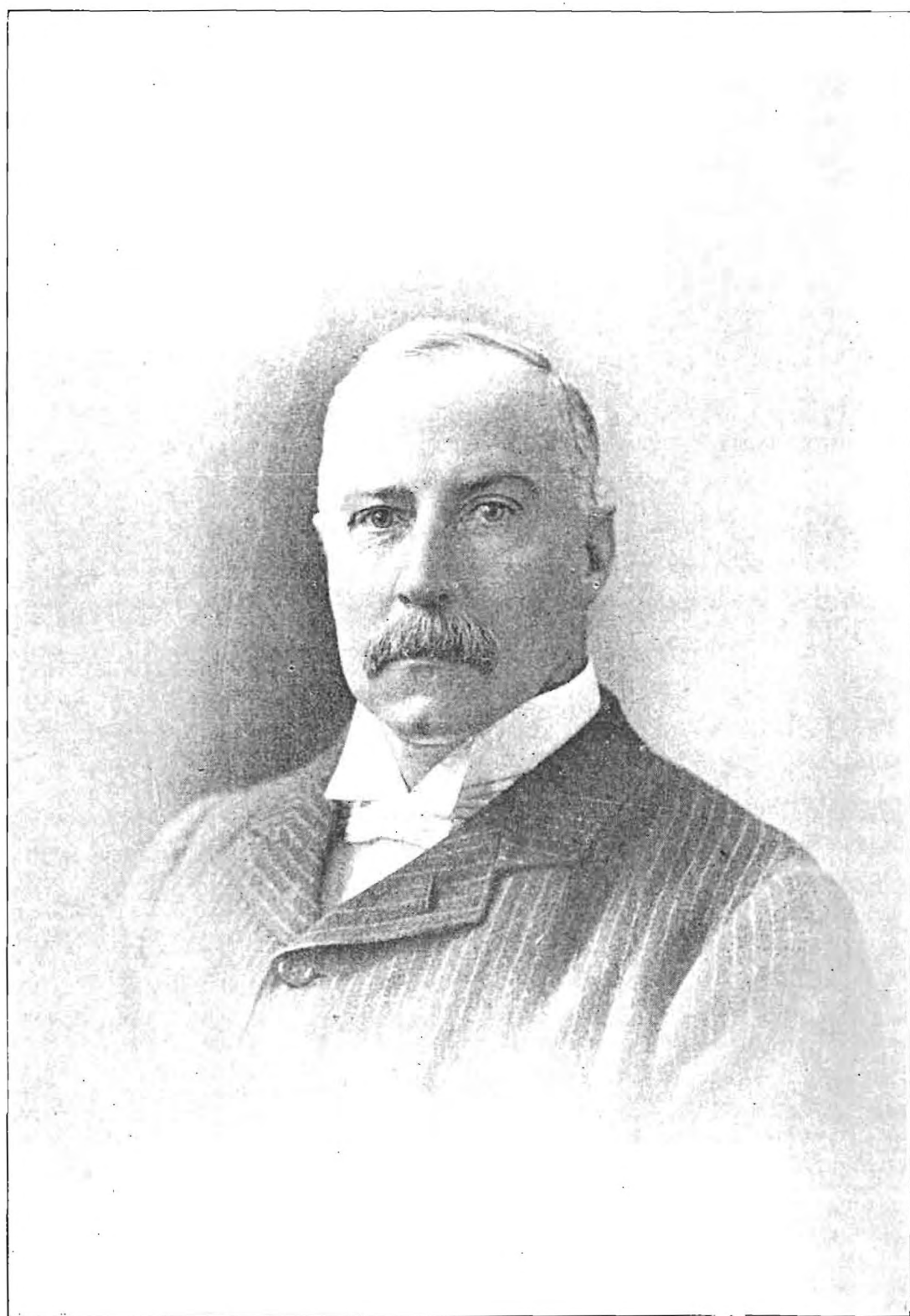
THE HON. JAMES COLEMAN FITZPATRICK,
FORMERLY JUDGE OF THE
SUPREME COURT, CAPE COLONY.

FITZPATRICK, JAMES COLEMAN

James Coleman Fitzpatrick was born in Tipperary, Ireland on 6 January 1816. He was the son of James Fitzpatrick, tradesman of Nenagh, and his wife, Bridget Cormack. He took his B.A. and L.L.B. degrees at Trinity College, Dublin, and was called to the Irish Bar in 1844 (Roberts gives the date as being 1842). In 1857 he was called 'speciale gratia' to the English Bar by Lincoln's Inn, and accepted the position of Chief Justice of the Gold Coast. He sailed for the Gold Coast on H.M.S. Polyphemus. The ship took out a full compliment of officials to 'replace, or relieve, or help those who had died or were expected to die'. It was said that there were thirteen all told, and before the year was up Fitzpatrick was the only one alive. Fitzpatrick is reported to have said-perhaps with slight joking exaggeration-that he was, 'Governor, Chief Justice, Colonial Secretary, Commander of the Forces, Marriage Officer and Postmaster, with only coloured staff and a few white traders to help him'. In 1861 he was appointed Judge of the Supreme Court of British Kaffraria. His appointment was gazetted on 15 November 1861, and he opened the court on 12 February 1862. When British Kaffraria was incorporated into the Cape Colony in April 1866, Fitzpatrick was appointed to the Supreme Court Bench and assigned to the Eastern Districts Court at Grahams-town. In 1869 he was transferred to Cape Town, where he remained until his retirement in 1879. In 1878 a Select

Committee of the House of Assembly was appointed to inquire into his fitness and capacity to discharge his functions as a judge. He was charged with (1) neglect of and absence from duty (5 instances alleged), (2) insobriety (5 instances), (3) physical disability, and (4) mental incapacity (5 instances). The Committee reported that (1) a to e had been satisfactorily explained, (2) a to e not established, (3) not established 'though there is evidence...that the judge did for a time in consequence of illness suffer from weakness to such extent as to render it difficult to perform the duties required of a judge', (4) a to e not established. Judge Fitzpatrick was a man of many parts. He was distinguished in society for his brilliant wit and humour and his large-heartedness. His quickness of perception, allied to a courteous and witty eloquence, earned him a favourable reception. He had no pretensions to being a profound lawyer, but his common sense and his deep knowledge of human nature stood him in very good stead. In 1861 he married Jenny Fitzgerald, daughter of Peter Fitzgerald of Westmeath, Ireland, and they had three sons and four daughters. One of his sons was Sir Percy Fitzpatrick. He was a prominent Roman Catholic and author of The Pope, his rights and duties : a letter to His Eminence Cardinal Wiseman. He died at Cape Town on 6 February 1880.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.360; The Late Hon. James Coleman Fitzpatrick, South African Law Journal, vol.21, 1904, p.89; Ellison Kahn, The Trials and Tribulations of Mr.Justice Fitzpatrick, South African Law Journal, vol.75, 1958, p.428; B.J.T.Leverton, James Coleman Fitzpatrick, in C.J.Beyers, Dictionary of South African Biography, Cape Town : Tafelberg, 1977, vol.3, p.298.



SIR THOMAS LYNDOSCH GRAHAM.

GRAHAM, SIR THOMAS LYNDON

Thomas Lyndoch Graham was born in Grahamstown on 5 May 1860. He was the sixth and youngest son of Robert Graham, resident magistrate of Grahamstown, Lieutenant-Governor of British Kaffraria and subsequently a member of the Legislative Council, and his wife, Eliza Gray. He was educated at St. Andrew's College, Grahamstown and the South African College. He took his degree at Claire College, Cambridge and was called to the Bar by the Inner Temple on 26 January 1885. He was admitted as an advocate on 23 April 1885. He quickly built up a reputation in criminal cases, and in 1891 he married Aimye Ismenia Gavin. They had two sons and one daughter. After unsuccessfully contesting the Beaufort West seat in the House of Assembly, he was elected to the Legislative Council in 1898 and before Parliament assembled he was appointed Attorney-General. The Ministry resigned in October of the same year, but in 1900 he resumed office as Colonial Secretary in Sir Gordon Sprigg's fourth Cabinet. In 1902 he again took over the Attorney-Generalship and retained it until the Ministry went out of office in 1904. He acted as Prime Minister for a few months in 1902. On 15 July 1904 he was appointed to the Bench of the Eastern Districts Court, but was immediately detached for duty as Chairman of the Civil Service Commission. He took his seat on the Bench for the first time in 1906 and soon showed promise as a judge. He was promoted to the Judge

Presidency on 15 April 1913 and continued in that post until he retired on 30 June 1937. Possessing a great deal of patience, he was an excellent trial judge with a ready wit. He cannot, however, be said to be a judge who contributed greatly to the exposition and development of legal principles. He was a constant champion of codification. From 1918 to 1920 he presided over the famous Union Public Service Commission of Inquiry. He died in Grahamstown on 7 May 1940.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.361; F.G.S, Sir Thomas Lyndoch Graham, South African Law Journal, vol.40, 1923, p.1; B.J.T.Leverton, Sir Thomas Lyndich Graham, in C.J.Beyers, Dictionary of South African Biography, Cape Town : Tafelberg, 1977, vol.3, p.341; George Randell, Bench and Bar of the Eastern Cape, Grahamstown : The Author, (1985), p.24.



SIR WILLIAM HODGES.

HODGES, SIR WILLIAM

William Hodges was born in Dorset, England on 29 September 1808. He was the eldest son of William Hodges of Weymouth, and his wife, Sarah Isaac. He was educated at a private School in Salisbury and at the University of London. At University he studied law and jurisprudence under Professor John Austin. He was called to the Bar by the Inner Temple on 3 May 1833 and commenced practice in London. However he found it necessary to join the Western Circuit, and in time, he became its acknowledged leader. In 1835 he began reporting cases in the Court of Common Pleas, and published a volume of reports annually until 1838. In 1837 he was appointed Revising Barrister to the Counties and Boroughs of Devon and Cornwall, which appointment he retained until his departure for the Cape. In 1839 he published A Report of the Case of Queen v. Lumsdaine, with Observations on the Parochial Assessment Act. In the following year, in collaboration with G. Willman and F. L. Wollaston, he produced Reports of Cases argued and determined in the Court of the Queen's Bench from Hilary Term to Michaelmas Term 1838, which were continued under the title of Term Reports until 1841. In 1842 he published a treatise entitled The Law relating to the Assessment of Railways. This was followed in 1845 by The Statute Law relating to Railways in England and Ireland. In 1847 he published the standard work on the subject entitled The Law relating to Railways and Railway Companies.

During this time he acquired a practice as a commercial and maritime lawyer, and on 14 November 1846 he was appointed Recorder of Poole. He was also employed as a parliamentary draftsman, and drafted the Bill that was to become the Public Health Act of 1848. Unexpectedly in 1857, he was offered the Chief Justiceship of the Cape Colony. The offer must have caused him some misgiving, because he had little facility in Latin and no knowledge of Roman Dutch Law. However he accepted the appointment and received the Royal Warrant on 2 February 1858. Shortly afterwards he was knighted and set sail for the Cape on 2 March 1858. He landed at the Cape on 15 May and was sworn in as President of the Legislative Council. Five days later he took his seat on the Bench and was sworn in by Judge Bell. On the Bench he proved to be genial, kindhearted and sympathetic. He was most pleasant to the practitioners and was particularly helpful to the junior Bar, with whom he exhibited great patience. In criminal trials he was most conscientious and fair. His tendency towards leniency, and his stock theft sentences often offended the farming community. As a lawyer, he was overshadowed by the exceptional learning and ability of his colleagues Bell, Cloete, Watermeyer and Connor. Nonetheless he was alert and energetic, and he seldom had difficulty in arriving at a conclusion of law or fact. His judgments were concise and to the point, although on occasion when his conception of the law did not coincide with his notion of Christian ethics 'he was tempted to

indulge in heroics'. On and off the Bench he proved to be most popular. His home was open to all and his parties were rendered particularly enjoyable by his attractive and talented family. In 1835 he had married Mary Scholar, daughter of James Saunders of Weymouth. Three sons and four daughters were born of the marriage. His health was at all times good and accordingly no fears were entertained when it was announced in August 1868, that he was confined to his room with a congestion of the lungs. On 17 August the public was shocked to learn that he had died. On 19 August all the public offices were closed 'in recognition of the lamented decease', and Sir William was buried in Rondebosch Cemetery in the presence of a vast assembly. In court Judge Bell, in addressing the public, was 'affected even to tears' and much of his speech was 'quite inaudible'. The Cape Argus in announcing his death stated the following;

'We believe that there is not a single district in the colony in which this announcement will fail to cause sorrow. No man had fewer enemies-indeed we doubt whether he had one; few men were more personally liked whether as Chief Justice or as President of the Legislative Council-whether as judge or politician, honesty and integrity of purpose undoubtedly guided Sir William Hodges in all he did and said-while as a man he has scarcely left one behind him more kind-hearted and amiable.'

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.364; F.St.Leger, Sir William Hodges, South African Law Journal, vol.51, 1934, p.303; A.F.Hattersley, Sir William Hodges, in C.J.Beyers, Dictionary of South African Biography, Cape Town : Tafelberg, 1977, vol.3, p.396.



Wm M Hopley
May 1914

Witherby & Co. London Eng.

Photo Hudson Cape Town

THE HON. W. M. HOPLEY.
JUDGE OF THE SUPREME COURT.
(CAPE PROVINCIAL DIVISION)

HOPLEY, WILLIAM MUSGROVE

William Musgrove Hopley was born in Cradock on 13 June 1853. He was the son of Frederick Hurlingh Hopley, a land surveyor, and his wife, Miss von Abo. After attending the Albert Academy at Burghersdorp, he became a boarder at St. Andrew's College, Grahamstown. The headmaster persuaded Hopley's parents to let the young Hopley accompany him to Brighton College, England. However the ship in which they set sail was wrecked near Agulhas. Fortunately no lives were lost and William was placed under Canon Ogilvie at the Diocesan Collegiate School, Rondebosch. He eventually became head boy of the school and passed the 3rd class examinations of the Board of Examiners in 1870. In 1871 he passed the Survey examinations, and in 1872 obtained the 2nd class certificate. After spending a year on the family farm at Burghersdorp, he returned to Cape Town to read for the Bar in advocate Cole's chambers. However he persuaded his father to send him to Cambridge, where he entered Pembroke College in 1874. He took a first class degree in the Law Tripos and was called to Bar by the Middle Temple on 26 January 1878. He returned to Cape Town where he was admitted as an advocate on 12 April 1878. He practised for a few months at Cape Town, then at Grahamstown until August 1883, when he went to Kimberley. On 2 July 1885 he was appointed acting Crown Prosecutor, and in 1886 the appointment was confirmed. On 18 March 1892 he was appointed to the Bench of High

Court of Griqualand. He remained as a judge at Kimberley until 1906, although he was on duty mainly at Cape Town from 1904 onwards. When the High Court was reduced to a single judge court in 1907 he was stationed permanently at Cape Town. On 1 October 1914 he was appointed to the Southern Rhodesian Bench. He died in harness on 10 March 1919, while on a visit to Johannesburg. His numerous judgments were marked by 'a felicity of literary expression, careful research into authorities and, above all, a strong desire to approach the matter in hand from a common-sense standpoint'. He was a good sportsman and took an active interest in education. In 1882 he married the elder daughter of John van der Bijl, member of the Legislative Council for the Western Divisions. They had two sons and one daughter.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallach's, 1942, p.364; S.B.Kitchin, The Hon. William Musgrove Hopley, South African Law Journal, vol.31, 1914, p.245.



SIMEON JACOBS

JACOBS, SIMEON

Simeon Jacobs was born in London some time between 1830 and 1831. He was the eldest son of Lewis Jacobs, a London solicitor. He was educated at the City of London School, and entered the Inner Temple on 2 November 1848. He was called to the Bar on 17 November 1852 and commenced practice on the Home Circuit. In 1860 he arrived at the Cape with a letter of introduction from Sir George Grey, and was admitted as an advocate on 28 December 1860. According to the court records, the words 'upon the true faith of a Christian' were excluded from his oath, as he professed the Jewish religion. Jacobs was the first Jew to be admitted to the Bar in South Africa. He was also the first Jew to be appointed Attorney-General and to become a judge. He applied for the post of Attorney-General of British Kaffraria, and on 18 April 1861 the Secretary for Colonies informed the Cape Governor that he had selected Jacobs for the office. When British Kaffraria was annexed to the Cape Colony in 1866, Jacobs was appointed Solicitor-General for the Eastern districts. In 1872 he was appointed acting Attorney-General, and on 14 May he introduced the Responsible Government Bill, delivering a noteworthy address on that occasion. After the Constitutional Ordinance Amendment Act was passed, Jacobs returned to his post as Solicitor-General in Grahamstown. However in December 1873 he was again appointed acting Attorney-General, and assumed office on 24 December 1873. In

1874 he was elected to represent Queenstown in the House of Assembly and his appointment as Attorney-General was confirmed. On 21 August 1877 his health failed and he resigned the Attorney-Generalship. In the following year he gave up his seat in the House of Assembly. He left for England with his family, but returned to the Cape in 1880 after partly recovering his health. He was offered the recordership of Griqualand West, but declined the offer and was appointed, instead, to the Eastern Districts Bench on 1 February 1880. Illness, however, compelled him to take leave on 15 April of that year and he never returned to the Bench. In 1882 he was created a C.M.G. Although never considered brilliant, he was regarded as a sound lawyer. According to Kotzé, he was 'a plodder and a bit heavy, but rather a strong opponent when he had thoroughly studied his brief'. As a judge he did not deliver any reported judgment of significance. He died in England on 15 June 1883.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.365; Ellison Kahn, Simeon Jacobs, in D.W.Krüger, Dictionary of South African Biography, Cape Town : Tafelberg, 1972, vol.2, p.334; M.Barnett, Simeon Jacobs, South African Law Journal, vol.50, 1933, p.1; S.A.Rochlin, The Hon.Mr.Justice Simeon Jacobs, Johannesburg : S.A.Jewish Board of Deputies (Unp. memorandum).



Wetherby & Co. London, Eng.

Photo by Elliott & Fry

THE HON. SYDNEY TWENTYMAN JONES, L.L.D.
JUDGE PRESIDENT OF THE
EASTERN DISTRICTS' COURT.

JONES, SYDNEY TWENTYMAN

Sidney Twentyman Jones was born in Cape Town on 20 January 1849. He was educated at the Diocesan College, Rondebosch and the South African College. In 1868 he obtained the 2nd class certificate of the Board of Examiners and proceeded to Cambridge, where he entered Trinity Hall. He obtained the L.L.B. degree in 1872, being law prizeman and scholar of his year. He was called to the Bar by the Middle Temple on 17 November 1873. He returned to the Cape and was admitted as an advocate on 24 February 1874. At the Cape Bar he displayed a considerable aptitude for commercial law, and was engaged in many of the major cases of the day. Although not a gifted orator, he distinguished himself by his painstaking industry. He was appointed to the Bench on 6 September 1882 and was assigned to the High Court of Griqualand. On 1 July 1887 he was transferred to the Eastern Districts Court, where he became Judge President on 2 August 1901. He resigned on 5 July 1904 and died in 1913. He was noted for his good nature and courtesy, and for the interest he showed in the promotion of both education and sport. In 1876 he was admitted to the L.L.M. degree, and in 1890 his University conferred the honorary L.L.D. degree upon him. In 1878 he married Florence Hayter, daughter of the well-known attorney, H.M.Ardene. Five sons and three daughters were born of the marriage.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.365; The Hon.S.Twentyman Jones, South African Law Journal, vol.20, 1903, p.341.

KEKEWICH, GEORGE

George Kekewich was born in Islington, London in 1778. He was the fifth son of William Kekewich of Northbrook, Exeter, and his wife, Susanna Johnstone. He was admitted to Emmanuel College, Cambridge on 20 October 1795 and was awarded a foundation scholarship. He graduated in 1800 and entered Lincoln's Inn on 12 June of that year. After being called to the Bar, he emigrated to the Cape in 1808. On 7 June 1810 he was appointed Assessor in the Court of Appeals, and on 10 June 1811 he was appointed judge of the Vice-Admiralty Court. In 1828 he was appointed to the Bench of the newly established Cape Supreme Court. On the Bench he was overshadowed by his colleagues Sir John Wylde, William Menzies and Burton. There was no display of rhetoric in his judgments, which were strictly confined to matters at issue. In criminal cases he was considered to be unduly lenient. His second marriage, to Catharina de Waal, was contracted at the Cape in January 1812. He retired on 12 October 1843 and returned to England where he lived, enjoying a colonial pension of £950 until his death.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.367; A.F.Hattersley, George Kekewich, in C.J.Beyers, Dictionary of South African Biography, Cape Town : Tafelberg, 1977, vol.3, p.359.



Photographed by London

Photo by Stannard, Cape Town

THE HON. JOHN GILBERT KOTZÉ.

KOTZE, JOHANNES GYSBERT

Johannes Gysbert Kotzé was born in Cape Town on 5 November 1849. He was the younger son of Petrus Johannes Kotzé, member of Parliament, mayor of Cape Town, and, after 1842, owner of Leeuwenhof estate, and his wife, Susanna Maria Blanckenberg. Although he was named after his maternal grandfather, he used the anglicized form, John Gilbert, all his life. He was educated at the Tot Nut van het Algemeen Institute and the South African College. He proceeded to England in May 1869 and, after matriculating at the London University, he entered the Inner Temple. He obtained the Senior Exhibition in Common Law in 1872, and graduated as an L.L.B. of London University in 1873. He was called to the Bar by the Inner Temple on 30 April 1874. Before returning to the Cape in August, he married Mary Aurelia Bell of Milton House, Clapham. He was admitted as an advocate of the Cape Supreme Court on 18 August 1874 and commenced practice in Cape Town. In June 1876 he moved to Grahamstown, where he translated a large portion of Van Leeuwen's Commentaries. In 1877 he was offered the Chief Justiceship of the South African Republic. He telegraphed his acceptance and left Grahamstown in March. En route he heard, at Kimberley, that Sir Theophilus Shepstone had, in the meantime, annexed the territory. When he arrived at Pretoria he was appointed sole judge of the High Court on 19 May 1877. At the time he was the youngest man to have been appointed a judge in

any British territory. In March 1880 it was made known that Jacobus Petrus de Wet had been appointed Chief Justice. Believing that this was invalid, Kotzé asked the Privy Council to declare the appointment invalid and to confirm his claim to the post of Chief Justice. However, soon after the dispatch of his petition, the news reached Pretoria that the Transvaal burghers had proclaimed the reinstatement of the Republic at Heidelberg on 16 December 1880. In terms of the Pretoria Convention which followed the First Anglo-Boer War, Kotzé was appointed a member of the Commission which had been set up to investigate and compensate claims for losses and injuries sustained during the war. On 8 August 1881 he was appointed Chief Justice by the reinstated Boer government, and de Wet was transferred to Ceylon. Matters did not run smoothly with the Boer government, and in 1882 Kotzé accepted the first puisne judgeship of the High Court of Griqualand. However the Pretoria government prevailed upon him to withdraw his resignation as Chief Justice. Kotzé soon proved adamant in his insistence on the independence of the Bench in relation to the executive. This gradually led to conflict. The first signs of this conflict arose in the Nellmapius case. Alois Hugo Nellmapius, a well-known concessionary, was convicted of theft in September 1886. Points of law were, however, reserved for consideration by a full Bench, but, President Kruger meanwhile pardoned the convicted man. Kotzé immediately had Nellmapius re-arrested, but the full Bench agreed with the defence on its points of law. In

the meantime Kotzé's interest in politics had been stimulated, and in 1893 he accepted nomination for the presidential elections. However he only polled 81 votes. The struggle between the Bench and the executive came to a head in 1897. At that time the Volksraad legislated in three ways. Firstly in a formal manner as prescribed in the Constitution, with three months notice to the public. Secondly in the same formal manner but without notice. Thirdly through informal resolutions during the course of the session. The validity of these resolutions (besluiten) caused the dispute. In 1884 the court upheld the validity of a besluit (McCorkindale's executors v. Bok, N.O. (1884) 1 S.A.R. 202). Three years later the court confirmed this view (Dom's trustees v. Bok, N.O. (1887) 2 S.A.R. 189). However Judge Jorissen held that besluiten which did not follow the prescribed procedure were invalid. The Volksraad reacted by decreeing, in Act No.4 of 1890, that no doubt could be cast on the validity of a besluit which had been published by the President in the Staatscourant. In 1895 Kotzé stated that he had changed his views and was of the opinion that the court did in fact have the right to inquire whether a law had been passed in accordance with the procedure prescribed in the constitution. (Hess v. the State (1895) 2 Off. Rep. 112). In 1897 Kotzé and Judge Ameshoff reversed the decision in the McCorkindale case and held that besluiten were invalid and that Act No.4 of 1890 was itself invalid in that it conflicted with the Constitution (Brown

v. Leyds, N.O. (1897) 4 Off. Rep. 17). The government was placed in an untenable position, because, according to the judgment, all besluiten were now invalid. The Volksraad then passed Act No.1 of 1897, without giving notice, decreeing that the court had no testing power and that on being appointed, a judge had to take an oath undertaking not to exercise such testing powers. The President could, in terms of this Act, ask the judges whether they claimed this power, and dismiss those who did. When the crucial question was asked, the judges suspended the sessions of the court sine die. Through the mediation of Chief Justice de Villiers an agreement was reached in terms of which the judges undertook not to exercise their testing powers, on condition that the Volksraad passed an Act to the effect that the Constitution could not be amended except through a particular procedure. However a dispute arose as to whether President Kruger in fact honoured his undertaking to have such an Act passed, and on 5 February 1898 Kotzé withdrew from his part of the agreement. Kruger then dismissed him on 16 February 1898. Kotzé travelled to England for a few months, before returning to practice as an advocate in the Transvaal. However he left the Transvaal in August 1899 and moved to the Cape. In 1900 he was appointed Attorney-General of Southern Rhodesia. He resumed his career as a judge in 1903, when he was appointed to the Bench of the Eastern Districts Court. On 8 July 1904 he became Judge President. In 1913 he was transferred to

the Cape Provincial Division, where he became Judge President on 14 June 1920. He was knighted in 1917. On 16 June 1922 he was elevated to the Appellate Division, where he remained until his retirement in 1927. He died in Cape Town on 1 April 1940, having served as a judge for fifty years. He made an important contribution to the development of Roman Dutch Law and his wide knowledge enabled him to apply the law correctly where others would have turned to English sources which were more readily accessible. Together with Friedrich Jeppe, he published De Locale Wetten der Zuid-Afrikaansche Republiek, 1849-1885. The second volume, for 1886-87, was edited by him alone. He also reported four volumes of the Transvaal judgments (1881-92). His importance lay not only in his publications and his numerous judgments, but also in the encouragement he gave others. He wrote a series of articles in the South African Law Journal which dealt with the History of Roman Dutch Law. He also translated Simon van Leeuwen's Het Roomsche-Hollands Recht. In 1922 he published Causa in the Roman and Roman-Dutch Law of Contract, which attacked the English doctrine of 'consideration'. In 1896 he received the Knight Grand Cross of the Portuguese Order of the Conception. In 1912 the University of the Cape of Good Hope conferred the honorary L.L.D. degree on him, and in 1927 the University of Cape Town honoured him in the same way. Out of his marriage to Mary Aurelia Bell one son and six daughters were born. His Biographical Memoirs and Reminiscences were published in two volumes in 1934 and 1949.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.367-8; The Hon. J.G.Kotzé, South African Law Journal, vol.20, 1903, p.101; V.G.Hiemstra, Johannes Gysbert Kotzé, in W.J.de Kock, Dictionary of South African Biography, Cape Town : Tafelberg, 1968, vol.1, p.438.



SIR JOHN LANGE.

LANGE, SIR JOHANNES HENRICUS

Johannes Henricus Lange was born in Uitenhage on 1 April 1852. He was the eldest son of Frederic Henry Lange. He received his early education at Uitenhage, before proceeding to England where he attended school at Brighton. He entered Trinity College, Cambridge in 1872 and obtained the L.L.B. degree in January 1876. He was called to the Bar by the Inner Temple on 17 November 1876. He returned to the Cape, where he commenced practice at Kimberley on 1 December 1877. He soon acquired a considerable practice, and was retained with Sir Richard Solomon as counsel for De Beers and the Mining Board. In January 1879 he was appointed Parliamentary Draughtsman and Clerk to the Legislative Council of Griqualand West. He retained these offices until the annexation in October 1880. From 1888 to 1892 he represented Kimberley in the House of Assembly, where he acted as Government Whip to the Rhodes Ministry. He resigned from Parliament in order to take up an appointment as Crown Prosecutor, which post he retained until his elevation to the High Court Bench on 15 February 1896. In 1900 he was appointed as a member of the Special 'Treason' Court. When the High Court was reduced to a single judge court in July 1907, Judge Lange was retained at Kimberley. In 1915 he was appointed President of the Special Court for Treason Trials, and after the sittings of the court were concluded, he was appointed Chairman of the Commission of Inquiry into the causes of the rebellion.

In 1914 he had been appointed sole Commissioner to inquire into the charges of bribery against the Chairman and certain members of the Transvaal Provincial Council. In recognition for his public services, he was knighted in 1917. He acted as Chairman of the Delimitation Commission of 1919, and as Chairman of the Asiatic Inquiry Commission of 1920. In 1885 he married the eldest daughter of William Grimmer, district surgeon of Kimberley. Two sons and a daughter were born of the marriage. Both his sons entered the legal profession. Before his elevation to the Bench he was Chairman of the Griqualand West Turf Club and one of the original Stewards of the Jockey Club of South Africa. He was extremely fond of shooting, and was for a time President of the Kimberley Golf Club. He played a prominent part in the public affairs of Kimberley, where he was Chairman of the Hospital Board, and Vice-Chairman of the School Board. He was still in office when he died at Muizenberg on 5 January 1923.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.369; Sir John Lange, South African Law Journal, vol.37, 1920, p.395.



THE HONOURABLE MR. JUSTICE LAURENCE,
JUDGE PRESIDENT OF THE HIGH COURT OF GRIQUALAND.

LAURENCE, SIR PERCIVAL MAITLAND

Percival Maitland Laurence was born in Lincolnshire, England on 20 April 1854. He was the eldest son of the Rev. Perceval Laurence, rector of Walesby. After being educated privately, he entered Corpus Christi College, Cambridge, where he soon became a leading debater. In 1876 he obtained a First Class Classical Tripos and was elected a Fellow. He was a brilliant scholar and obtained many honours and prizes. He was called to the Bar by Lincoln's Inn on 18 November 1878 and obtained the L.L.M. degree the following year. He was a regular contributor to many of the leading journals of the day and his articles showed 'varied learning with remarkable lucidity of thought and expression'. Considerations of health made it necessary for him to leave England and he sailed for the Cape, where he was admitted as an advocate on 29 November 1880. In 1881 he went to Kimberley, where after a year, he was appointed to the Bench on 7 September 1882. On 16 March 1888 he was appointed Judge President of the High Court. From 1905 to 1907 he served as Chairman of the War Losses Inquiry Commission, and also did duty in the Supreme Court at Cape Town. When the High Court was reduced to a single judge court in July 1907, provision was made for his retirement. From 1909 to 1910 he was Chairman of the First Delimitation Commission. In 1911 he was acting ordinary Judge of Appeal. In 1912 he served as Chairman of the Second Delimitation Commission.

In the same year he was appointed acting Judge President of the Natal Provincial Division. In 1914 he was appointed Chairman of the South African University Commission. After his return to England, he served on the Royal Commission on Fire Brigades and Fire Prevention. He obtained a L.L.D. degree from Cambridge in 1884, and was knighted in 1908. In 1911 he was made a K.C.M.G. In his literary work, as in his judgments, he tended to over-elaboration, but his writings showed wide learning, his style was lucid, he had a pretty wit, and his use of the English language was masterly. He was a frequent contributor to the Cape Law Journal, and several of his essays and reviews were reprinted in a book entitled Collectanea. A second collection of his articles were published under the title On Circuit in Kafirland and other Sketches and Studies. His last literary work was The Life of John Xavier Merriman. He took a keen interest in education and was an examiner in both Classics and Mathematics for the University of the Cape of Good Hope. He was also a pioneer of the public library in South Africa. He was Chairman of the Committee of the Kimberley Public Library from 1883 to 1900. In 1891 he compiled the Catalogue of the Kimberley Public Library. He also wrote the Inaugural address of the first conference of South African Librarians which was held in 1904. He died a bachelor on 28 February 1930.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.369; The Hon.Mr. Justice P.M.Laurence, South African Law Journal, vol.18, 1901, p.119; R.F.Kennedy, Sir Percival Maitland Laurence, in C.J.Beyers, Dictionary of South African Biography, Cape Town : Tafelberg, 1977, vol.3, p.500.



W. H. L. Co. London, England.

Photo by J. E. Barnard, Adderley St. Cape Town

THE HON. J. D. G. A. S. R. P.

MAASDORP, CHRISTIAN GEORGE

Christian George Maasdorp was born in Malmesbury on 11 June 1848. He was the third son of Dr. Maasdorp of Graaff-Reinet. In 1867 he obtained the Second Class Certificate in Literature and Science of the Board of Examiners. He then proceeded to London where he was called to the Bar by the Inner Temple on 6 June 1871. He returned to Cape Town where he was admitted as an advocate on 3 August 1871. He commenced practice in Griqualand West, before moving to Grahamstown, where he remained until 1877. In that year he was appointed Attorney-General of the Transvaal. He left the Transvaal in February 1880 and resumed practice at Cape Town. He took an active interest in politics, but was unsuccessful in his efforts to secure the Oudtshoorn seat in support of the Sprigg Ministry. On 12 April 1882 he was nominated Eerste Strafrechter by the Transvaal Government, but refused the appointment. On 1 November 1885 he was elevated to the Bench of the Eastern Districts Court, where he remained until 1896, when he was transferred to Cape Town. In 1889 he was appointed Chairman of a Commission of Inquiry into the Liquor Laws. In 1896 he had the M.A. degree conferred on him by the University of the Cape of Good Hope, under the provision of section 6 of the University Incorporation Amendment Act, whereby holders of certificates of the Board of Examiners became entitled to degrees of the University. From 1902 to 1903 he was a member of the University Council. In consequence

of indifferent health, he was not very active in public affairs. The main features of his judgments were 'their lucidity and logicality'. On the Bench he was courteous and patient, and seldom made a remark during the course of a case. With the advent of Union he became Judge President of the Cape Provincial Division and Judge of Appeal. He retired on 30 June 1922, and died in May 1926, leaving a family consisting of two daughters and four sons.

* A.A.Roberts, A South African Legal Bibliography,
Pretoria : Wallachs, 1942, p.370; The Hon. C.G. Maasdorp,
The South African Law Journal, vol.24, 1907, p.129.

MENZIES, WILLIAM

William Menzies was born in Edinburgh on 27 April 1795. He was the eldest son of John Menzies, First Solicitor of Customs at Leith, and his wife, Barbara Laird of Dumbar-ton. He was educated at the local academy, and graduated at the University of Edinburgh. In 1813 he was elected as a member of the Edinburgh Debating Society, and became an extraordinary member in 1816. In 1817 he joined the Pitt Club of Scotland. He was admitted to the Faculty of Advocates on 1 June 1816. While practising at the Edinburgh Bar, he became a trooper in the Edinburgh Light Horse. He was also a member of the Royal Company of Archers, being one of the sixteen archers upon whom the freedom of Musselburgh was bestowed in 1820. In 1826 he was admitted as a Burgess and Guild Brother of the Burgh of Dumferline. He was acquainted with Sir Walter Scott, and became an esteemed friend of Scott's biographer, John Gibson Lockhart. Very little is known about his practice at the Bar, apart from the fact that he earned £715 in 1826. In 1827 he refused an offer of the Attorney-Generalship at the Cape, but accepted the senior puisne judgeship of New South Wales. However the Colonial Office felt that his training in Civil Law would be more valuable at the Cape, and he was offered the senior puisne judgeship. He accepted the appointment on the understanding that he was to be considered eligible for the Chief Justiceship when the next vacancy occurred. Prior to his departure for the

Cape, he spent some time in London where he acquainted himself with the laws and judicial system of the colony. His request for a copy of the Statutes of India was, however, unable to be fulfilled. He was also of the opinion that 'it was essentially important to the peace of the colony, as well as the favourable reception and popularity of the new judicial system to be introduced, that the laws by which the press was in future to be regulated were to be settled and defined'. On 30 April 1829 Ordinance 60 was duly promulgated. It brought press freedom to the Cape and gave the judges the power to decide whether a matter was libellous or not. On 7 August 1827 he set sail for the Cape on the vessel Hope. He reached the Cape on 9 October. On 10 December 1827, he took the oath of allegiance, together with the other judges, at Government House. He took his seat in the newly created Supreme Court on 1 January 1828. At the outset Menzies 'unremittingly devoted himself to the task of dispelling the confusion which had arisen by the introduction of the new judicial system...which had thrown the local jurisprudence into a state of considerable uncertainty and confusion'. He also tried to settle the decisions of the court upon a secure basis, and spent most of his spare time compiling his reports. The manuscript reports were recognized as precedents by the Supreme Court and were frequently referred to by the Bench and Bar. He was always willing to permit use being made of them, and he intended to have the reports published. On his death

the inhabitants of Cape Town petitioned the government to purchase the manuscript for purposes of publication. However the petition was not granted and the reports were only published in 1870. On 23 February 1828 Menzies married Ann Helena Christian, the daughter of Captain Hood Hanway Christian. Menzies was responsible for drafting many of the important Ordinances which appeared in the Cape Statute book. According to Graham Botha, 'the chief part of the most material alterations and amendments on the law of the colony and on the system of administration of justice within it, originated with him, and the drafts of the Ordinances and Rules of Court by which they were effected, were framed solely by him'. In 1839 when Anthony Oliphant, the Attorney-General, was promoted to the office of Chief Justice of Ceylon, Menzies protested that his claims to promotion had been overlooked. In the following year, upon the death of Sir Anthony, he applied to be appointed to fill the vacancy of Chief Justice of Ceylon. However Sir Andries Stockenström entered into a controversy with Menzies, regarding the latter's conduct towards the Chief Justice. Stockenström imputed that Menzies and his wife had taken a hand in instigating the rumours that Sir John Wylde had been having an unnatural relationship with his daughter. A lengthy correspondence passed between Menzies and Stockenström, which was subsequently published in 1840 under the title Notice of a Narrative of a correspondence, etc., between the Hon. Mr. Justice Menzies and Sir Andries Stockenström, Bart. Al-

though Menzies refuted all the insinuations made against him, it probably cost him the much sought after promotion. In 1842 Menzies was involved in what has been described as 'one of the most remarkable episodes in which a judge has been involved'. He crossed the river at Allemans Drift and, purporting to act under the Cape of Good Hope Punishment Act, proclaimed the whole of the country North of the river to be British territory. He did so in order to forestall Jan Mocke and his followers from proclaiming the territory a republic. Sir George Napier, the Cape Governor, did not approve of the judge's extra-judicial action and he repudiated the whole proceeding as being unauthorized. However he was convinced that Menzies had acted solely for the preservation of peace and repression of crime. Menzies was of an impetuous nature and had an irritable temper. Advocate Cloete (afterwards Judge), also of a hasty temperament, once challenged Menzies to a duel. The coolness and apparent insensibility of Judge Menzies to the feelings of others were often manifest. It is said that he once passed sentence of death on a murderer, ending with the usual words, 'And may the Lord have mercy on your soul', and without hesitating for a moment went on; 'Go on with the next case'. However he was not devoid of a certain amount of humour. Judge Menzies was one of the staunchest defenders of the Roman Dutch Law. From his thorough knowledge of the Scottish and Roman Law, he appreciated the legal system at the Cape, and, although the authorities intended to bring

it in line with the Law of England, he endeavoured as far as it lay in his power to uphold the traditions of the Roman Dutch Law. His indefatigable energy was one of his characteristics, and on circuit he frequently sat on the Bench without any interval from nine in the morning until one or two o'clock in the morning of the following day. When he set out on his last circuit in September 1859, he was in indifferent health. He sat on the Bench for the last time at Burghersdorp on 29 October. From there he proceeded to Colesberg, and, unable to reach it on the 31st, he put up at a farm twenty-four miles from his destination. That night he ate nothing and suffered considerably. Punctually at six he was ready to start off. Two or three times the driver stopped the phaeton because of the judge's suffering, but he was told to proceed. Dr. Barclay, 'a steady intelligent Scot', had ridden on horseback all the way from Grahamstown to accompany the judge from stage to stage. Colesberg was reached at noon, and the street was filled with farmers and others waiting for the opening of the court. Arriving at the residence appointed for the judge, Menzies attempted to rise but fell back on his seat. He was lifted out of the phaeton and carried inside. The doctor attempted to administer some remedies, but he never rallied, and died ten minutes after he had been carried into the house. In 1891 the following reference was made in the Cape Law Journal at p.155;

'In Mr. Justice Menzies the Supreme Court of that time possessed a veritable giant of strength. He may be said to have been the first great interpreter

and expounder of Roman-Dutch Jurisprudence as it has been handed down to us, and is still followed by us. It is impossible to read the three volumes of Menzies' Reports without at once noticing and recognizing the master mind of this singularly able and powerful lawyer, who has indelibly left his stamp on the jurisprudence of our country. It was not English Law but that of the Netherlands that Menzies and his colleagues so ably administered in their day. A glance at the reported cases establishes this beyond all contradiction.'

Unfortunately no portrait or written account of Judge Menzies exists. However he appears to have been a man below the average stature and of ruddy complexion. His son remembers him as a clean-shaven man, inclining to stoutness and looking the country gentleman type. He could not deny his nationality, because his speech was as broad as that of any Scotchman.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.371-2; G.Graham Botha, The Honourable William Menzies 1795-1850, South African Law Journal, vol.33, 1916, p.385.

MUSGRAVE, WILLIAM

William Musgrave was born in London on 26 September 1792. He was the younger son of Christopher Musgrave, and belonged to a Cumberland family with connections in the West Indies. On 13 July 1809 he entered the Inner Temple at the age of sixteen, and was called to the Bar on 14 June 1814. On 1 November 1818 he was appointed Solicitor-General of Antigua, Barbuda and Montserrat. On the arrival of Sir Benjamin D'Urban as Governor-in-Chief, a friendship arose between the two men. On 12 August 1823 Musgrave was promoted to Attorney-General, and married D'Urban's daughter in Antigua. On 17 October 1836 Musgrave and his family set sail for the Cape and arrived at Table Bay two days before Christmas. He was admitted as an advocate on 30 December 1836. From 16 March to 16 September 1839 he acted as Attorney-General, and on 12 October 1843 he was elevated to the Bench. Judge Musgrave proved to be a popular figure on the Bench. He was described as 'a perfect gentleman-always courteous and imbued with a strong sense of decorum-dignity ever surrounded the Bench on which he had his seat; and he never forgot himself, neither the Press nor the public ever found just occasion to reprehend his conduct'. Musgrave was often accused of erring on the side of leniency when meting out punishment to criminals, and the disparity between his sentences and those of his colleagues was commented on during the debate on the reports

of the Committee of Inquiry into the judicial establishment of 1845. As a lawyer he was considered 'sound, thorough and conscientious, though slow in coming to a conclusion'. He made no display of rhetoric in his judgments, which were short and strictly to the point. In the famous case of Letterstedt v. Morgan and others (1849) 5 Searle 373, he was involved in an altercation with Sir John Wylde and Judge Menzies, during which he threatened to leave the Bench. He was noted for his kindness and philanthropy, and played a prominent part in the social life of the colony. He served as a member of the Council of the South African College and took a great interest in educational matters. He was a supporter of representative government, and when Parliament met for the first time in 1854 he was called upon to swear in the members of the Legislative Council. Immediately afterwards he departed on circuit. However the strain was too great and he was unable to complete the circuit. He died at his home in Wynberg on 6 October 1854 at the age of sixty-two.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.372; F.St.Leger, The Hon. Mr.Justice William Musgrave, South African Law Journal, vol.54, 1937, p.279; A.F.Hattersley, William Musgrave, in D.W.Krüger, Dictionary of South African Biography, Cape Town : Tafelberg, 1972, vol.2, p.506.



THE HON. MR. JUSTICE J. D. SHEIL.

SHEIL, JOHN DEVONSHIRE

John Devonshire Sheil was born in Dublin in 1855. On completing his education he obtained a commission in the 4th Royal Dublin Fusiliers. In the late seventies his regiment was sent to the Cape, and he saw active service in the Basuto War of 1880 - 1881. After returning to Ireland he gave up his commission and joined the Inner Temple on 17 May 1886. He was called to the Bar on 15 May 1889 and returned to Cape Town where he was admitted as an advocate. In 1891 he brought out the first volume of the Shiel's Reports, which were printed and published by the Cape Times. The reports, subsequently known as the Cape Times Law Reports, were personally prepared and edited by Sheil until his elevation to the Bench in 1902. In 1896 he was appointed Assistant Law Adviser to the Crown. He proved to be a most efficient draftsman and was invaluable as an adviser to the Law Department. After taking long leave in 1900, he returned to his duties and helped in re-organising the Department. On 1 July 1902 he was elevated to the Bench and was assigned to the Eastern Districts Court. As a judge he was held in high regard by all. He was also regarded as a sound lawyer, and had a thorough knowledge of the case law. His long experience as a prosecutor 'equipped him well for his duties in criminal work and his persistent determination to arrive at the root of every matter before him made him singularly fitted for judicial office'. In private life he

was a genial personality and took a keen interest in all forms of sport. He was an ardent Roman Catholic and was described as a 'fine man, with a fine brain and not a single enemy'. He retired on 25 July 1913 and died at Muizenberg on 26 March 1935.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.375; F.St.Leger, The Honourable Mr. Justice J.D.Sheil, South African Law Journal, vol.54, 1937, p.143.



* *W. & A. G. London, Eng.*

Head & Co. New York

THE LATE SIR SIDNEY G.A. SHIPPARD, KCMG, DCL

SHIPPARD, SIR SIDNEY GODOLPHIN ALEXANDER

Sidney Godolphin Alexander Shippard was born in Brussels, Belgium on 29 May 1837. He was the eldest son of Captain William Henry Shippard of the 29th Regiment, and his wife, Elizabeth Lydia Peters. He was educated at King's College School, London, and Oxford University, where he took a B.A. degree in Law and Modern History in 1863. This was followed by the B.C.L. and M.A. degrees in 1864. He was called to the Bar by the Inner Temple on 26 January 1867 and sailed for the Cape, where he was admitted as an advocate on 18 August 1870. After practising for a short time in Cape Town he moved to Kimberley. On 25 January 1873 he was appointed acting Attorney-General, and on 17 August 1875 the appointment was made permanent. In 1878 he was appointed acting Recorder. He went to Oxford the following year and obtained the D.C.L. degree. On his return to the Cape, he commenced practice in Grahamstown, where he was appointed to the Bench on 20 April 1880. He resigned early in 1885 and represented Britain on the joint Commission which sat in Cape Town to determine Anglo-German claims to territory acquired before Germany had established control over Angra Pequena and the West coast. On 1 September 1885 he was appointed Administrator and Chief Magistrate of British Bechuanaland, and Deputy-Commissioner of the Bechuanaland Protectorate. He was created a C.M.G. in 1886 and K.C.M.G. in 1887. He retired on 16 November 1895, when British Bechuanaland was

annexed to the Cape Colony. On 21 April 1898 he joined the Board of Directors of the British South Africa Company. He was a talented lawyer and left an impression on South African jurisprudence. On the Bench he was dignified, courteous, thorough, learned and sound. Apart from his thesis entitled Dissertatie de vindicatione rei emptae et traditione, he published a report on the case Merriman v. Williams in 1879. He was a member of the Colonial Institute and the Royal Geographical Society. On 19 January 1864 he married Maria Susanna Stockenström, the second daughter of Sir Andries Stockenström, who left him with three children when she died in 1870. On 18 February 1894 he married Rosalind Sanford, daughter of W.A.Sanford, of Somerset, England, who survived him with four children. He died in England on 29 March 1902.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.375; Sir Sidney Shippard, South African Law Journal, vol.19, 1902, p.323; A.L.Harington, Sir Sidney Godolphin Alexander Shippard, in D.W.Krüger, Dictionary of South African Biography, Cape Town : Tafelberg, 1972, vol.2, p.662.



THE LATE HON. CHAS. THOMAS SMITH, LL.D.,
FORMERLY SENIOR PUISNE JUDGE, SUPREME COURT, CAPE COLONY.

SMITH, CHARLES THOMAS

Charles Thomas Smith was born in London on 20 November 1823. He was the eldest son of Charles Smith, of Fulham. He was educated at the Western Grammar School, Brompton, and in Germany. He entered the Inner Temple on 2 June 1842, and was called to the Bar on 30 April 1857. The greatest part of his life between these dates was spent at Cambridge, first as a student and subsequently as a tutor. In 1847 he obtained a B.A. degree with honours in mathematics. He was a good oarsman and was Cambridge cox in the 1854 boat race against Oxford. After his call to the Bar, he joined the Norfolk Circuit, and was subsequently a member of the Home Circuit. In 1866 he was a candidate for the office of Recorder at Pulo Pinang, but owing to his mother's illness he had to abandon the idea of going to the East. In 1869 he edited The Lawyers' Companion. He was a good marksman and for a number of years was a member of the Inns of Court Volunteers. On 10 February 1869 he was appointed a judge of the Cape Supreme Court, and was assigned to Grahamstown. He was the last judge to be appointed directly by the Home Government. During his residence at Grahamstown he took a keen interest in community matters and was the founder of the Eastern Districts Rifle Association. He applied himself to the study of Roman Dutch Law and acquired a knowledge of the Dutch language. In 1872 he married Emily Greathead, the second daughter of J.H.

Greathead, a former member of the Legislative Council. In 1875 he was the recipient of an honorary L.L.D. degree from the University of Cambridge. During the 1877 rebellion he took an active part in raising the equipment of the Grahamstown Volunteers, and was instrumental at the conclusion of the war in securing the nucleus of a fund for the purchase of a building, for the use of the Public Library. In 1880 he was transferred to Cape Town, where he retired on 12 April 1892. He became senior puisne judge in 1887, and on three occasions he acted as Chief Justice and President of the Legislative Council. He was a member of the South African Library Committee, and was on the Council of the South African College. He did much to encourage higher education, and served the University of the Cape of Good Hope as member of Council, President of Convocation and examiner. He was Vice-Chancellor of the University from 1889 to 1893, and was elected Chancellor in 1898. His judgments were marked by 'a sound knowledge of law and strong common sense'. He died at Rosebank on 10 February 1901.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.227; The Late Hon. Charles Thomas Smith, South African Law Journal, vol.18, 1901, p.227; B.J.T.Leverton, Charles Thomas Smith, in D.W. Krüger, Dictionary of South African Biography, Cape Town : Tafelberg, 1972, vol.2, p.672.



Wetherby & Co. London, Eng.

Photo. Elliott & Fry

THE HON. W H SOLOMON.
FIRST PUISNE JUDGE, SUPREME COURT TRANSVAAL

SOLOMON, SIR WILLIAM HENRY

William Henry Solomon was born in Philippolis on 25 September 1852. He was the son of the Rev. Edward Solomon, and his wife, Jessie Mathews, a niece of Dr. John Philip. He was educated at Lovedale, the Bedford Public School and the South African College. In 1871 he won the Porter Scholarship, which enabled him to enter Peterhouse College, Cambridge. Poor health prevented him from completing a Mathematical Tripos, and he was awarded an aegrotat degree. He was called to the Bar by the Inner Temple on 17 November 1877 and returned to the Cape, where he was admitted as an advocate on 12 April 1878. After practising for a short time at Cape Town, he moved to Kimberley. In 1879 he published a translation of part of Voet's Commentarius ad Pandectas. On 1 October 1883 he was appointed Circuit Prosecutor, a post which later became known as Assistant Legal Adviser to the Crown. He retained this post until his appointment to the Kimberley Bench on 1 July 1887. He was characterized at the Bar 'by his grasp of a case, his lucidity of expression, and an unerring logic'. He was transferred to the Eastern Districts Court in March 1896, where he remained nominally until 28 March 1902. During the last eighteen months of this period he served as President of the Special Court appointed under the Indemnity and Special Tribunals Act of 1900. On 29 March 1902 he was appointed to the Transvaal Bench. He was knighted in 1907. In a dis-

patch to Chamberlain, Lord Milner referred to Solomon as 'one of the best men on the Colonial Bench'. With the advent of Union, he was appointed to the Appellate Division of the Supreme Court. In 1913 he was made a K.C.M.G., and in 1914 a K.C.S.I. On 1 March 1927 he became Chief Justice, and was sworn in as a Privy Councillor in April 1928. He retired in 1929 and received an honorary L.L.D. degree from the University of Cape Town. His work as a judge of the Special Court was no enviable one. He was accused of undue severity by some; by others, again, of excessive leniency. He delivered many authoritative judgments while sitting as a judge of the Transvaal court. But it was as a judge of appeal, in particular, that he showed his versatility as a jurist. Like Lord de Villiers, he was a judge rather than a jurist, and without fear or favour he was fair to all the parties appearing before him. Among his most characteristic qualities were 'his sincerity, patience, balance, caution, courage and wisdom'. He was, however, known among the advocates as a 'difficult judge'. Apart from warm-hearted loyalty towards his friends, he was also endowed with a particularly fine sense of humour. However occasionally his sense of humour lost its delicacy and resulted in a sardonic expression and a sarcastic tongue. After his retirement he settled in Wales for the sake of his health. He died of a heart attack and was buried in the Brookwood cemetery, London, on 16 June 1930. His wife, Maud Elizabeth Christian, daughter of H.B.Christian, or Port Elizabeth predeceased him.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.376; The Hon. W.H. Solomon, South African Law Journal, vol.21, 1904, p.189; M.J.Swart, William Henry Solomon, in D.W.Krüger, Dictionary of South African Biography, Cape Town : Tafelberg, 1972, vol.2, p.683.



THE HON. MR. JUSTICE ANDRIES STOCKENSTRÖM.

STOCKENSTRÖM, ANDRIES

Andries Stockenström was born in Graaff-Reinet on 22 April 1844. He was the second son of Sir Andries Stockenström, and his wife, Elsabe Helena Maasdorp. He was educated at King's College, London, and took his degree at the London University. He then proceeded to Germany where he studied jurisprudence. On 17 November 1865 he was called to the Bar by the Middle Temple, and on 20 March 1866 he was admitted as an advocate of the Cape Supreme Court. After a short spell in Cape Town, he moved to Grahamstown where in a very short time he became recognized as a 'most popular and able advocate'. On 24 December 1867 he married Maria Hendrietta, daughter of J.H.Hartzenburg, member of the House of Assembly for Graaff-Reinet, and in the following year the birth of his son added to his responsibilities. At about the same time his father-in-law suffered financial collapse, and he was obliged to care for the family. On 10 September 1875 he was appointed Judge of the Griqualand West Land Court. He worked under great strain at high pressure and was subjected thereafter to bitter criticism. To ease his distress, Sir Bartle Frere, the Cape Governor, agreed to support his plea for a full Royal Commission of Inquiry into his conduct. However the Colonial Office refused on the grounds of 'Mr. Stockenström's high reputation for the conscientious discharge of his official duties'. In 1876 he unsuccessfully contested the Grahamstown Parliamentary seat. On 22 August

1877 he was appointed Attorney-General, and held the office without a seat in Parliament until the dismissal of the Molteno Ministry on 5 February 1878. He successfully contested the Albert seat in the 1878 Parliamentary elections, and retained it until he was elevated to the Bench of the Supreme Court on 22 September 1879. In March 1880, despite ill-health, he went on circuit. However he collapsed at Swellendam and died on 22 March, which was the date of his thirty-sixth birthday. It is interesting to note that he was born on the 22nd, his only child was born on the 22nd, he was appointed Attorney-General on the 22nd, he was elevated to the Bench on the 22nd, and he died on the 22nd. As a lawyer he had a great reputation, although during his short period on the Bench few cases of importance came before him. In private life he took a keen interest in public affairs and served on numerous committees. At the time of his death he was a member of the Council of the University of the Cape of Good Hope. At Cape Town he commanded the Cavalry Troop. As a man he was popular with all. In the words of Lord de Villiers, his outstanding qualities were 'fearless honesty and a thorough devotion to duty'.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.377; F.St.Leger, The Hon. Mr.Justice Andries Stockenström, South African Law Journal, vol.53, 1936, p.259; W.A.Maxwell, Andries Stockenström, in C.J.Beters, Dictionary of South African Biography, Durban : Butterworths, 1981, vol.4, p.620.



THE HON. SIR THOMAS UPINGTON, K.C.M.G.

UPINGTON, SIR THOMAS

Thomas Upington was born in County Cork, Ireland on 28 October 1844. He was the eldest son of Samuel Upington, an Irish country gentleman, and his wife, Mary Tarrant. After attending the Mallow Public School and the Cloyne Diocesan School, he entered Trinity College, Dublin on 11 October 1861. He obtained his B.A. degree in 1865, and was called to the Irish Bar in 1868. As a result of ill-health, he decided to emigrate to the Cape Colony in 1874. Prior to his departure, he was admitted to the M.A. degree. In 1872 he married Mary Guerin, of Edenhill, Mallow, in County Cork. They had three sons and two daughters. Immediately on landing at the Cape on 12 October 1874, he was admitted as an advocate of the Supreme Court. He gradually recovered his health and soon established himself as a powerful speaker and successful counsel. In 1878 he was elected to represent Colesberg in the House of Assembly, and was appointed Attorney-General in the Sprigg Ministry. In 1879 his failure to remove the Koe-gas trials to Cape Town was severely criticized. When the Sprigg Ministry fell in May 1881, he became leader of the opposition. On 13 May 1884 he was called on to form a Ministry and succeeded Scanlan as Premier. In November 1886 he was allowed to resign from the Premiership, but continued to hold office as Attorney-General. In 1887 he accompanied Hofmeyer and de Villiers to the Colonial Conference in London. He was knighted in recognition of his

services. With the fall of the Sprigg Ministry in July 1890, he was obliged to give up the Attorney-Generalship. His health at this time was far from satisfactory, and he accepted a seat on the Bench in April 1892. In January 1896 the Rhodes Ministry fell, and Sir Thomas, after four years on the Bench, resigned in order to become Attorney-General. He held the portfolio until April 1898, when his health compelled his resignation. He died at his home in Breda Street, Cape Town on 10 December 1898. As an advocate 'he approached very near to the ideal, being a master of every department of the advocacy'. However his years on the Bench were not particularly distinguished. It is understood that 'he never once differed from the rest of the court upon any question of law'. Although he excelled in handling witnesses, his legal learning was not profound. Lacking the temper of a great judge, he showed a distaste for inevitable social isolation and for what seemed to him 'the boring dignity' of judicial life. In earlier life he had been fond of cricket and hunting, and was seldom absent from race-meetings. In social life he excelled, having 'all the qualities of a successful raconteur-slow and measured speech, a good voice, a clear, retentive memory, and an intense appreciation for the humorous episodes of life'. In politics he was said to have been most 'versatile'. His eldest son, Beauclerk Upington, later became a leading criminal lawyer.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.379; F.St.Leger, The Honourable Sir Thomas Upington, South African Law Journal, vol.53, 1936, p.1; A.F.Hattersley, Sir Thomas Upington, in D.W.Krüger, Dictionary of South African Biography, Cape Town : Tafelberg, 1972, vol.2, p.758.



HON. MR. JUSTICE EGIDIUS BENEDICTUS WATERMEYER.

WATERMEYER, EGIDIUS BENEDICTUS

Egidius Benedictus Watermeyer was born in Cape Town on 21 August 1824. He was the second son of Frederick Stephanus Watermeyer, and his wife, Anna Maria Ziervogel. He attended Charles Gray's School, and was a pupil of the Rev. Edward Judge. He made such rapid progress that he was soon able to correspond with his brother, Fred, in classical Greek. In 1841 he was sent to the Netherlands, where he studied law at Leiden University, obtaining a doctorate cum laude in 1843 with his Dissertatio de Jure Patronatus. He moved to London, where he entered the Inner Temple and was called to the Bar in 1847. He returned to the Cape and was admitted as an advocate on 26 October 1847. On 9 December 1848 he married Johanna Catharina Henrietta Reitz, the eldest daughter of Gysbert Jan Carel Reitz, a notary of Cape Town. He never had to wait for work and from the start he threw his whole energy into his profession. He practised at the Bar for seven years and he appeared in practically every case of importance during that period. In 1854 he was elected to the newly established Parliament as the representative for Worcester. He resigned his seat on 13 October 1855, when he received an acting appointment to the Bench. On 13 November 1857 the appointment was made permanent. His mental qualifications were eminently suitable for the Bench and he made an excellent judge. It was not long before lawyers and the public recognized that he was a force to be

reckoned with in the legal and intellectual sphere. 'His power of reasoning was very strong; nothing was too subtle, nothing too large for his intellectual grasp; he detected sophistry almost instinctively, and the clear and easy sentences in which he used to brush away its webs were the delight of those who listened to him'. He possessed a phenomenal memory which was of the greatest value in the days before the publication of local reports. On the Bench he was most courteous and patient and was never known to exhibit signs of temper or irritation. His gentle conduct is all the more remarkable when it is born in mind that he suffered from gout. Judge Cole relates how he had seen him 'carried into the court in Grahamstown unable to put his foot to the ground, and evidently in torment, yet he sat perfectly quiet, and, though the writhing of his features often showed the agony he was suffering, he never uttered an angry or impatient word, and did a whole day's work without a complaint'. He possessed another valuable attribute; 'the power of expressing himself in the most terse and concise language'. One of his faults, however, lay in his love for 'elaborate judgments'. This at times led him into trouble and judgments were reversed on appeal, because he sometimes decided a case on some point not taken in argument. He was highly sensitive to the sufferings of others and it was said that he was 'too soft-hearted in sentencing criminals'. In addition to his contributions from the Bench, to Judge Watermeyer must go the distinction of publishing

the first volume of Cape law reports in 1857. He took a keen interest in matters not connected with law. He was the first person in South Africa to study the archival records purely for their historical significance. His Three Lectures on the Cape of Good Hope under the government of the Dutch East India Company, which were published in 1857, are characterized by a comprehensive study of archival sources. It was largely due to his efforts that steps were taken to save the Cape archival records from total neglect and ruin. In 1859, together with William Porter, he published a work entitled Community of Property and the Law of Inheritance at the Cape of Good Hope. He took a great interest in education and was mainly responsible for the establishment of the Board of Public Examiners in Literature and Science in 1858. He acted for many years as its President and Examiner in Law. In 1861 he was appointed Chairman of the important Commission whose Report on the Educational System of the Cape Colony appeared in 1863. To the end of his life he remained a great scholar. Translations from German poetry and his own erudite essays made up the bulk of his literary output. In 1877 Selections from the writings of the late E.B. Watermeyer, with a brief sketch of his life was published by Juta. In 1864 his brother Frederick Watermeyer died and he felt the loss acutely. In March 1865, his wife, who was accompanying him on circuit, died of a 'malignant form of diphtheria'. He never recovered from the double blow. He took leave and went to Europe in

1867 in an attempt to recover his health. However he was a broken man and he died in London on 21 September 1867.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.382; F.St.Leger, Mr. Justice E.B.Watermeyer, South African Law Journal, vol.52, 1935, p.135; Mr.Justice E.B.Watermeyer, Union Law Review, 1910, p.364; Egidius Benedictus Watermeyer, in D.W. Krüger, Dictionary of South African Biography, Cape Town : Tafelberg, 1972, vol.2, p.832.



SIR JOHN WYLDE.

WYLDE, SIR JOHN

John Wylde was born in London on 11 May 1781. He was the eldest son of Thomas Wylde, a wealthy London solicitor, and belonged to a distinguished legal family. His younger brother became Lord Chancellor, and his nephew sat as a Baron in the Court of the Exchequer. He was educated at St. Paul's School, where he became head-boy. He entered Trinity College, Cambridge in 1799, and obtained the B.C.L. degree in 1805. In the same year he was called to the Bar by the Middle Temple. On 16 July 1805 he married Elizabeth Moore. He entered the chambers of Mr. Joseph Chitty, a leading special pleader, and in due course commenced practice in the Court of Common Pleas. With the support of his father and his brother, who had recently been admitted as a solicitor, he built up a large practice. In 1815 he was appointed Judge-Advocate of New South Wales, and he settled with his wife and family in Sydney. As Judge-Advocate, he was both Chief Justice and Prosecutor. His biographers give conflicting accounts as to whether he was successful in discharging his dual offices. According to one account, he discharged his duties 'with credit and satisfaction to all'. This is supported by the glowing tribute which was paid to him at the final sitting of the court. On the other hand it is stated that his stay in Australia 'was not an entirely happy one'. It appears that the anomalies of his position as judge and prosecutor led him to quarrel with the Governors. He also app-

ears to have made an unfavourable impression on the Crown Commissioner, J.T.Bigge, who, in 1822, accused him of 'bias, of delivering obscure judgments and of employing relations on duties connected with his office'. In 1824 he was informed that the court was to be abolished, and, at the same time, he was promised a better appointment when it became vacant. He returned to England, where he obtained a D.C.L. degree at Cambridge in 1827. In 1827 he was appointed Chief Justice of the Cape of Good Hope. He was knighted at his own request, before departing for the Cape, which he reached in November 1827. He was joined by his eldest daughter, Jane Elizabeth, and five of his sons. His wife remained in Australia with the rest of his family. His nephew was also taken in as a member of the household, and was appointed as his clerk. The office was subsequently filled by his son. On 10 December he took the oath of allegiance at Government House, and on Tuesday, 1 January 1828 he presided over the first sitting of the newly constituted Supreme Court. His task was not an easy one as the law was in a state of confusion and uncertainty. Although he was not a great lawyer, 'he exhibited much judicial aptitude' and excelled in the trial of criminal cases. He was scrupulously fair, but tended to have heated arguments with counsel. He was a staunch supporter of the jury system and, in particular, the grand jury. However, together with Judge Menzies, he ruled that the jurors had to understand the English language. In his judicial work, he was

'most careful and painstaking, persistently following up each set of facts and train of thought'. His notes, which were meticulously recorded, formed the basis for the first two volumes of Searle's Reports. In delivering judgment, 'it was easy to see, from the copious and well considered memoranda with which he was supplied, that no labour had been spared in mastering the leading facts, or, indeed the most minute detail'. In 1834 he suffered a financial setback when his salary was reduced from £2,500 to £2,000 in the interests of economy. When the Second Charter of Justice was implemented in 1834, he was obliged to take his turn in conducting the half-yearly circuits. He was also deprived of the patronage over the minor officers of the court. In Letterstedt v. Morgan and others (1849) 5 Searle 373, he stamped out of court after some sharp and undignified exchanged with Judge Musgrave. He enjoyed excellent health up to his seventy-fifth year, at which time it was said that he had never once been absent from work on the grounds of indisposition. On 30 August 1855, he gave judgment in Pike v. Hamilton, Ress & Co. (1855) 2 Searle 191, two and a half months after the hearing, without referring to his notes. However four days later, while delivering judgment as judge of the Vice-Admiralty Court, he suffered a stroke and had to be carried out of the court. This was his last appearance on the Cape Bench after 27 years of continuous service. He retired on pension in October and in time recovered his health to some extent, but his speech was impaired and

he never regained the use of his right arm and leg. He died at his home, Hopefield Lodge, on 13 December 1859. In private life, he retained a gay dashing disposition and was fond of entertaining. As a father he proved most devoted, making many personal sacrifices for the upbringing of his children. He went through periods of serious financial embarrassment, but on his death it was found that in addition to leaving a substantial estate, he had carried life insurance in England to the extent of £5,000. He was a gifted orator, although inclined to be rather theatrical. He was also an accomplished musician and a connoisseur of the arts. He was an enthusiastic supporter of education and contributed generously to various institutions, ranging from the Infants' School to the South African College. He was a shareholder and member of the College Council from 1836 to 1855, holding office as Chairman from 1842 to 1853. He was also an ex officio member of the Council of Advice. His long-windedness and his insistence on participating in all the Council's business, however, soon indicated the undesirability of judicial interference in legislative measures. In November 1828, he was accordingly diplomatically relieved of his duties as a member of the Council, although he continued to act as legal adviser to the Governor. During the Anti-Convict agitation, he advised the Governor that he did not have the authority to send the convict ship away. The application of this advice nearly plunged the colony into civil war, and it severely shook the pub-

lic's confidence in the Bench. However Sir John redeemed himself by suggesting that the Upper House of the proposed Parliament should be elective. On the introduction of representative government, he was rewarded when he became ex officio President of the Legislative Council. He occupied this position with distinction until his retirement. In his public career, as might be expected, he was at times extremely unpopular. In 1831 unsavoury rumours concerning his private life began to circulate in the colony. According to the rumours, he had made his daughter pregnant and had concealed the birth of the child. On 25 September 1831 the Secretary for Colonies instructed the Governor to institute an official investigation into Sir John's private life. The investigation revealed that, if the rumours were not unfounded, they were certainly much exaggerated. It appeared that Sir John enjoyed the pleasures of the table beyond, it was said, the limits of temperance, and that he certainly lived beyond his means. With regard to the major charge, the 'expressions 'infamous and malicious calumny' and the 'chatter of idle women' were not misplaced. The matter ended officially with the Governor's report, but there were many who thought that Sir John should have had an opportunity of publicly vindicating his character. Accordingly on 10 April 1833, the members of the Bar and the side bar presented him with addresses in which they expressed their confidence in his innocence. In his private capacity Sir John was responsible for two leading cases. The first

case concerned his divorce proceedings. His wife had arrived from Sydney in 1835, accompanied by the remaining members of their family, which now included a daughter who was born some three years after he had left Australia. He instructed his attorney to obtain an admission of adultery from his wife. However at the trial it was discovered that the wrong date had been alleged for the adultery, and the court refused to grant the divorce. In delivering judgment, Menzies refused to follow a previous decision of the court which had granted a divorce in similar circumstances. Evidence was later taken on commission in New South Wales and Sir John obtained his order on 23 February 1836. The second case concerned his will. However the court upheld the codicil, which Sir John had drafted, and his estate was administered in accordance with his last wishes.

* A.A.Roberts, A South African Legal Bibliography, Pretoria : Wallachs, 1942, p.384; F.St.Leger, Sir John Wylde, South African Law Journal, vol.50, 1933, p.285; A.F.Hattersley, Sir John Wylde, in D.W.Krüger, Dictionary of South African Biography, Cape Town : Tafelberg, 1972, vol.2, p.861.

APPENDIX 2

CHRONOLOGICAL LIST OF CAPE COLONIAL ATTORNEY-GENERALS*

A. OLIPHANT	1828, January	-	1839, 16 March
W. MUSGRAVE	1839, March	-	1839, 15 September
W. PORTER	1839, September	-	1866, 17 March
W.D. GRIFFITH	1866, March	-	1872, 30 November
J.H. DE VILLIERS	1872, December	-	1873, 17 December
S. JACOBS	1873, December	-	1877, 21 August
A. STOCKENSTRÖM	1877, August	-	1878, 5 February
T. UPINGTON	1878, February	-	1881, 27 January
J.W. LEONARD	1881, January	-	1881, 3 May
T.C. SCANLEN	1881, May	-	1882, 30 June
J.W. LEONARD	1882, July	-	1884, 12 May
T. UPINGTON	1884, May	-	1886, 24 November
T. UPINGTON	1886, November	-	1890, 16 July
J. ROSE INNES	1890, July	-	1893, 3 May
W.P. SCHREINER	1893, May	-	1893, 27 December
H.H. JUTA	1893, December	-	1894, 9 September
W.P. SCHREINER	1894, September	-	1896, 12 January
T. UPINGTON	1896, January	-	1898, 12 May
T.L. GRAHAM	1898, May	-	1898, 13 October
R. SOLOMON	1898, October	-	1900, 17 June
J. ROSE INNES	1900, June	-	1902, 18 February
T.L. GRAHAM	1902, February	-	1904, 21 February
V. SAMPSON	1904, February	-	1908, 2 February
H. BURTON	1908, February	-	1910, 30 May

* Source of Reference : Ralph Kilpin, The Romance of a Colonial Parliament, London : Longmans Green, 1930.

APPENDIX 3

CHRONOLOGICAL TABLE OF CAPE COLONIAL LAW REPORTS*

CAPE SUPREME COURT AND COURT OF APPEAL

1828 - 1849	MENZIES' REPORTS	(3 VOLUMES)
1850 - 1867	SEARLE'S REPORTS	(5 VOLUMES)
1857	WATERMEYER'S REPORTS	(1 VOLUME)
1861 - 1867	ROSCOE'S REPORTS	(3 VOLUMES)
1871 - 1872	" "	
1877 - 1878	" "	
1868 - 1869	BUCHANAN'S REPORTS	(8 VOLUMES)
1873 - 1879	" "	
1880	FOORD'S REPORTS	(1 VOLUME)
1880 - 1910	SUPREME COURT REPORTS	(27 VOLUMES)
1891 - 1910	CAPE TIMES REPORTS	(20 VOLUMES)
1880 - 1886	BUCHANAN'S APPEAL CASES	(4 VOLUMES)
1904 - 1909	" "	

EASTERN DISTRICTS COURT

1880 - 1887	REPORTS OF THE EASTERN DISTRICTS COURT	(23 VOLUMES)
1891 - 1909	" "	"

HIGH COURT OF GRIQUALAND

1882 - 1910	REPORTS OF THE HIGH COURT OF GRIQUALAND	(10 VOLUMES)
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* Source of Reference: H.R.Hahlo and Ellison Kahn, The South African Legal System and Its Background, Cape Town : Juta, 1968, p.293-295.

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2. OFFICIAL PRINTED SOURCES
3. PRINTED COLLECTIONS OF DOCUMENTS
4. LAW REPORTS
5. SECONDARY SOURCES
 - (a) Bibliographies
 - (b) Biographical Material
 - (c) Books and Pamphlets
 - (d) Periodical Articles
 - (e) Unpublished Theses and Typescript Material
 - (f) Newspapers

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1. In the Cape Archives Depot, Cape Town.
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V.C.58. Commission appointing a Court of Admiralty at the Cape.
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 - (b) Government House

G.H. 1/67. Dispatches from the Secretary of State for Colonies.

G.H. 1/69.

G.H. 1/71.

G.H. 1/72.

G.H. 1/73.

G.H. 1/76.

(e) Lieutenant-Governor

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(c) Acts

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1833 3 & 4 W.IV., c. 41. Better Administration of Justice in the Privy Council.

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(b) Votes and Proceedings of the Cape Parliament

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(c) Annexures and Appendices to the Votes and Proceedings

	'53	Papers re Judicial Affairs.
A.24-	'54	Papers re Judicial Affairs.
G. 5-	'55	Papers re Judicial Affairs.
	'56	Select Committee re Sheriff's Department.
A.43-	'59	Papers re Judicial Affairs.
G.45-	'59	Papers re Judicial Affairs.
G.22-	'60	Select Committee re Sheriff's Department.
A.17-	'60	Select Committee re Sheriff's Department.
A. 2-	'63	Papers re Judicial Affairs.
A. 4-	'64	Papers re Judicial Affairs.
A. 7-	'64	Petition re Judicial Affairs.
A. 6-	'67	Papers re Judge Bell.
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(e) Proclamations, Ordinances and Acts

(1) Proclamations

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(ii) Ordinances

Ordinance No. 32 of 1827	Justice's of the Peace.
Ordinance No. 33 of 1827	Magistrates' Courts.
Ordinance No. 37 of 1828	Sheriff's Duties.
Ordinance No. 40 of 1828	Criminal Procedure.
Ordinance No. 41 of 1828	Jurors.
Ordinance No. 50 of 1828	Legal disabilities.
Ordinance No. 12 of 1845	Establishing Roman Dutch Law in Natal.
Ordinance No. 14 of 1845	Natal District Court.
Ordinance No. 32 of 1846	Rules of Court.

(iii) Acts

Act No. 7 of 1854	Civil Jury Trials.
Act No. 10 of 1855	Better Administration of Justice.
Act No. 20 of 1856	Magistrates' Courts.
Act No. 26 of 1856	Rules of Court.
Act No. 4 of 1858	Board of Examiners.
Act No. 12 of 1858	Legal Practitioners.

Act No. 12 of 1860	Magistrate's Jurisdiction.
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Act No. 21 of 1864	Administration of Justice.
Act No. 3 of 1865	British Kaffrarian Annexation.
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Act No. 9 of 1905	Better Administration of Justice.
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(a) Ordinances

Ordinance No. 7 of 1861	Jury Trials.
Ordinance No. 10 of 1861	Supreme Court.
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(b) Government Notices

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Government Notice No.80 of 1861	Appointment of Judge.
Government Notice No. 5 of 1862	Opening of Supreme Court.

GRIQUALAND WEST

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